The Central Law Journal.

ST. LOUIS, JANUARY 11, 1889.

CURRENT EVENTS.

On the first day of the year the law passed by the New York legislature providing for the execution, by electricity, of criminals under sentence of death, went into effect, and though the public will look with interest for the result of such an experiment, there is a well settled conviction in the minds of all, that its adoption is in the right direction and will indorse the language of Governor Hill in his message recommending it:

> The present mode of executing criminals by hanging has come down to us from the Dark Ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner.

The law provides that the court imposing sentence shall name merely the week within which the execution is to take place, the particular day within such week being left to the discretion of the principal officer of the prison. The execution is required to be practically private, only officials, clergymen, physicians and a limited number of citizens being allowed to be present.

Another reform now being agitated, and to which the attention of the New York legislature was called in the last annual message of Governor Hill is that of more stringent, satisfactory and uniform divorce laws. It has been suggested that a conference of representatives of all the States be held to consider the best method of securing wise and uniform marriage and divorce laws. At present the laws on these subjects vary in different States to the point of absurdity and injustice. A prominent writer who has made a study of the subject, concludes that we have no less than forty-six different codes for the accommodation of those who wish to free themselves from the bonds of matrimony, and the extent to which laws operate as sources of danger to the marriage relation may be seen in the fact that during the last twenty years the annual average of divorces in this country has been sixteen thousand five hundred. It is not reasonable to believe that divorces were really necessary in even a majority of these cases. The courts have granted them, not because good and sufficient reasons were given, but because the laws permitted the decree to be made for causes of a trivial nature. If one State does not offer the desired opportunity, some other State does. The laws ought to be so adjusted as to attach a deeper meaning to connubial vows and duties. It is desirable that marriages shall cease to be made with the understanding that at the first sign of dissatisfaction, or upon the slightest pretext of estrangement the courts will dissolve the union, and give the parties a chance to repeat the experiment.

A very learned and exhaustive discussion of "The Legality of Trusts," prepared by the eminent jurist, Theodore W. Dwight, will be found in the "Political Science Quarterly," for December. For the purposes of the article he divides the subject into three heads, viz:

1. Is the object sought to be accomplished by a "trust," legal, at common law, either (*a.*) by agreement of individual producer, not acting as stockholder in a corporation, or (*b.*) by agreement of stockholders.
2. If the end be legal, how far will it be possible for a State legislature to prohibit it?
3. What is the power of congress to legislate upon the subject.

He concludes that "trusts" are lawful; that they are legitimate modes whereby producers may regulate prices, and that neither congress nor States can legislate to suppress a partnership having no illegal purpose. The professor grows eloquent at the close of his argument, declaring that "trusts," as a rule, are not dangerous. They cannot overcome the law of supply and demand, nor the resistless power of unlimited competition. The right of association is the child of freedom of trade. It is too late to banish it. The only way out of the difficulty, if it be one, is to invade the right of property, limit production by law, cut down the employment of large capitals, and, perhaps, in the end hand over production to the State. All English speaking people have been engaged for a hundred years, both in overcoming natural obstacles to internal trade and in abrogating absurdly restrictive laws. It is not to be credited that

we shall commit the supreme folly of resorting to mischevious legislation, fully tried and long since abandoned.

The banquet recently given Chief Justice Fuller by the Chicago Bar Association, was a notable affair and the occasion of many able addresses. That of Hon. W. C. Goudy was conspicuous in its treatment of certain practical questions, of interest to the profession. The following, only a small portion of his able address, will interest, if not commend itself to all:

We have too many lawyers, too many judges, and too many cases in the courts. It has been popular to demand easy access to the courts, upon the theory that justice should be attainable by every person, and that a remedy should be found for every wrong with little expense. * * *

In this city and State, which may be accepted as a fair example of other parts of the country, we have one licensed lawyer for every one hundred male adult inhabitants. As there cannot be legitimate legal business among each hundred to support one lawyer, it follows that illegitimate and unnecessary litigation is encouraged.

In this county, twenty courts of record are in daily session, not counting the federal judges and justices of the peace. The expense borne by taxation upon property for the maintenance of these courts exceeds $500,000 per annum. This does not include the cost of court house or expenses met by the litigants themselves.

These facts are more startling when compared with the system of administering justice in England. There, with a population of about 30,000,000, and which is the financial and mercantile center of the world, forty judges dispose of all the business in courts of record, while in Illinois, with a population of about 4,000,000, the judges and courts corresponding to the forty in England, number 170.

Some remarks made by Mr. James L. High on the same occasion will surprise those of us who have been of the impression that the spirit of greed, gain and gold, characteristic of Chicago merchants, possessed the lawyers of that city, even in a larger degree. Mr. High said:

Another popular misconception touching the profession is that its members are accustomed to receive certain pecuniary emoluments, vulgarly called fees, as compensation for services rendered. It is a matter of simple duty to correct so gross a slander which we have too long suffered. There are, it is true, traditions that a few of our seniors, including perhaps, such Nestors of the bar as my brother Goudy or my brother Swett, have in an occasional period of mental aberration, been known to accept, under protest a modest honorarium from a confiding client. But these are only isolated cases. And the bar of Chicago constitutes a species of eleemosynary corporation whose one thousand eight hundred members are constantly going about on a sort of perennial mission of peace on earth and good will toward men.

It is interesting, even at this late day, to learn that the members of that bar, accept, for their services, only what they can get, and that only when it is forced upon them by a guileless client, who takes advantage of their helpless mental condition.

NOTES OF RECENT DECISIONS.

An opinion of interest to the Illinois bar will be found in Chaplin v. Commissioners, etc.,[1] recently decided by the supreme court of that State. It was there held, directly overruling Eckhart v. Irons[2] and Lucan v. Cadwallader,[3] that proceeding, under the highway law of Illinois to drain a road through adjacent lands, involves a question of freehold, as thereby a perpetual easement is imposed on the land, and, consequently, that the appellate court had no jurisdiction of the case.

1 18 N. E. Rep. 765.
2 6 N. E. Rep. 15.
3 7 N. E. Rep. 286.

The Court of Appeals of Maryland, in the recent case of Bowie v. Hall,[1] decided a question upon both sides of which authorities may be found,[2] though the weight of them is in accordance with this decision. It was there held, that a stipulation in a note, in case of non-payment at maturity to pay costs of collecting the same, including attorneys' commissions, is valid. The court says:

We are not aware of any case in which such a contract has come before an English court; and this may result from what we believe to be the fact, that the practice of remunerating attorneys and solicitors for their professional services, by a certain percentage on the money collected by them for their clients by suits in court, has never prevailed in England. In this country, however, such a practice has been commonly adopted. Contracts, therefore, like the present, are not unusual here, and have become numerous in recent times. In some cases their validity has been denied by the courts, but it seems they are sustained by a decided preponderance of authority.

1 16 Atl. Rep. 64.
2 See Machine Co. v. Moreno, 7 Fed. Rep. 806; Bank v. Sevier, 14 Fed. Rep. 662.

The Supreme Court of California in a recent case,[1] novel at least to that State, has

1 Sesler v. Montgomery, S. C. Cal. 19 Pac. Rep. 686.

punctured one of the numerous fictions surrounding the relation of husband and wife. It was therein held that a communication by a husband to his wife of slanderous words in regard to a woman is a publication. The court says:

We have not been referred by appellant to any decision in support of the precise point, except one,[2] decided by an inferior court. We have not had access to this report, but from the mention of the case in Townshend on Slander we should infer that the decision proceeded on another ground, and that what is said in relation to the question in hand is merely a *dictum*. Nor have we been able to find any case exactly in point. Upon principle we should say that there was a publication. That husband and wife are one person is a mere fiction, and is not true for all purposes. The tendency of modern law, especially in California, is certainly not to extend the operation of the fiction. Nor do we see any reason why it should be extended, at least in the present direction. The reputation of a woman can certainly be injured by slanderous communications to her female friends; and the fact that the communication came through a husband would not ordinarily deprive it of its injurious effect.

2 Trumbull v. Gibbons, 3 City H. Rec. 97.

An interesting question of insurance has recently been decided by the United States Circuit Court, Northern District, Illinois.[1] The contention was whether a court of equity has jurisdiction where there is a claim against several insurance companies, for the same loss, upon different policies, to apportion the loss among the respective companies and require payment from each of the amount for which it is liable. Judge Blodgett, in deciding the question affirmatively, says:

It is obvious that, in separate suits at law against each of these insurers, the complainants would have been required to establish by proof to a jury, or to the judge in case a jury was waived, the proportion of loss to be borne by each class of insurers, as well as the amount to be paid by each member of that class—that is, how much of the loss, if any, should be borne alone by the marine insurance, and how much, if any, should be borne alone by the fire insurance, and how much, if any, should be borne by the two classes jointly; and it is clear that courts and juries might, and probably would, have differed widely as to the division of the loss between the two classes of insurers, if not as to the division between the members of such classes, and hence the complainants in suits at law would have been in peril of failing to recover perhaps a large portion of their actual loss by reason of different findings of juries or courts upon the same evidence. And, when several parties are liable to a contribution for the payment of a common debt or obligation, an apportionment of the amount to be contributed and paid by each has always been deemed within the field of equity jurisprudence.[2] * * * These authorities, and others to which my attention has been called, seem to me, to amply support the jurisdiction of this court to give the relief asked by this bill, while the complainants' remedy at law would almost necessarily be uncertain and incomplete.

1 Fuller v. Detroit, etc. Ins. Co., 36 Fed. Rep. 469.
2 Garrison v. Insurance Co., 19 How. 312.

In Greenwood v. Holbrook,[1] recently decided by the New York Court of Appeals, that court reversed the decision of the supreme court[2] in the interpretation of the meaning of the term "legal representatives" in a contract drawn up by way of compromise of conflicting claims under a contested will. The controversy arose between executors, who claimed that they were the legal representatives of a deceased woman, and on the other hand, her next of kin who made same claim relying upon the statute of distributions. The supreme court decided in favor of the ordinary meaning of the term, and awarded the fund to the executors. The court says:

We differ from the conclusion of the court below, and are of opinion that the proper construction of the agreement in question requires us to hold that the phrase "legal representatives" contained in it means "next of kin" to the child dying, and not the executors or administrators of that child. It must be conceded that it might mean either, and numerous cases are referred to in support of the contention of each party. No one case is, however, so like the present as to require its adoption, and little instruction would be given by an analysis of the decisions.

1 18 N. E. Rep. 711.
2 42 How. 633.

An opinion of exceeding interest, as to the right of sale of homestead under execution, has recently been rendered by the Supreme Court of North Carolina,[1] which is the more readable by reason of the very able dissenting opinion of Judge Davis coupled with it. The case turned on the question as to whether a sale under execution was valid where the sheriff had not caused homestead to be allotted, but where the judgment upon which the execution was issued and the land sold was for the recovery of a debt antedating the constitution and laws providing for homestead.

The court, upon the authority of McCanless v. Flinchum[2] and Edwards v. Kearzey,[3] held that the sale was invalid, saying:

While it is conceded that under the constitution of the United States, as construed and applied to the exemption enactment, a debt previously created, and be-

1 Morrison v. Watson, 7 S. E. Rep. 796.
2 98 N. C. 359.
3 96 U. S. 595.

fore the State constitution was adopted, must be paid out of the debtor's estate, and the exemption must give way when it cannot be otherwise satisfied out of the debtor's property, yet the debtor possesses still the right to retain exempt from sale, even at the instance of such a creditor, whatever excess there may be in his hands after the disposition of so much as may be needed to discharge the debt, and to have an inquiry made, in the mode prescribed by law, to have the fact ascertained previous to the sale. * * * It has been repeatedly declared, and, after an elaborate and exhaustive examination of the subject in separate opinions, settled by a majority of the members of the court in McCanless v. Flinchum, already cited, that, without regard to the time of origin of the debt, the provisions of the statute for laying off the homestead must be observed.

Judge Davis, in his dissenting opinion, says:

As I understand the decision of the Supreme Court of the United States in Edwards v. Kearzey,[4] and the decisions of this court in Gheen v. Summey,[5] Earle v. Hardie,[6] and Richardson v. Wicker,[7] in conformity with that decision, and immediately following it, article 10, §§ 1, 2, of the present constitution, and the legislative enactments for carrying that article into effect, are void as to contracts made prior to the adoption of the constitution, because they violate that provision of the constitution of the United States which declares that "no State shall pass any * * * law impairing the obligation of contracts." It will not do to say that the law affects the remedy, and not the rights, of parties to the contract. If the law affecting the remedy impairs the obligation of the contract—lessens the value of the contract—it is void; and it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case it is prohibited by the constitution.

4 *supra.*
5 80 N. C. 187.
6 *Id.* 177.
7 *Id.* 172.

Apropos of the very general litigation incident to the maintenance and public management of telephone companies and the attempts of legislature and city councils to regulate such service, comes a novel case from Indiana, decided recently by the United States Circuit Court.[1] The case grew out of the fact that the Bell Telephone Company, complainants herein, had, in most of the cities of that State, furnished telephone accommodations, but withdrew therefrom after the passage by the legislature of an act limiting its rates of charges. This was a suit by the Bell Telephone Company against a rival company, who are engaged in furnishing telephone accommodations generally in that State, for infringement of patent, and asking for an injunction. The court says:

The law gives the owner of a patent the exclusive right to the use of the device covered by his patent; and the rule that because the patentee, or owner of a patent, cannot agree, with those who wish to use his device, as to the price to be paid for such use, authorizes another to pirate upon the patent with impunity, would be destructive of patent property.

It was urged upon the argument that this court had decided in the former case,[2] that a patentee who did not put his patent into use was not entitled to an injunction, and that decision was invoked on the argument of this application for an injunction. I, however, think that the case there made was another and widely different one from this. There the patentee had never made a machine, nor put his patent into use, nor allowed another person to put it into use. He had simply locked it up, so to speak, and kept the public from the benefit of it. Here the patentee has put his patent into extensive use, and is receiving a large income for such use at rates agreed upon between the owners of the patent and the user.

1 American Bell Tel. Co. v. Cushman Tel. Co., 36 Fed. Rep. 488.
2 Hoe v. Knap, 27 Fed. Rep. 204.

The Supreme Court of New Jersey, in a recent case,[1] wherein the question was as to what constitutes a partnership, use the following language:

What constitutes a partnership is not easy to define, abstractly, so that it will apply to all cases; but whether certain facts tend to show the relation of partnership is less difficult, though often perplexing, because of the nice distinctions that have been made in the decided cases, and the variety of circumstances that surround such transactions. The recent case of Wild v. Davenport,[2] having carefully examined the cases in other courts, notably the leading case of Cox v. Hickman,[3] together with cases in our own courts, reaches this conclusion: that a right to receive a share of the profits of a business does not furnish an invariable test of a partnership, even as to creditors; that a person not actually engaged in the business as a principal, and not holding himself out as a partner, cannot be held for debt contracted in the business as a dormant partner, unless in virtue of some contract, express or implied, on his part, in legal effect creating, as between him and the persons actually carrying on the business, the relation of principal and agent.

1 Seabury v. Bolles, 16 Atl. Rep. 54.
2 48 N. J. Law, 129.
3 8 H. L. Cas. 268; 9 C. B. (N. S.) 47.

In the case of Town of Knightstone v. Musgrove,[1] the Supreme Court of Indiana disregard and refuse to accept the English principle laid down in Thorogood v. Bryan,[2] and lay down the rule, followed[3] with but one or two exceptions in this country, to the effect that the negligence of a driver of a vehicle is not the negligence of the passenger injured through the negligence of a third person, and holding directly that the negligence of a man, who invited plaintiff, a woman, to ride with him in his carriage, the man keeping full con-

1 18 N. E. Rep. 452.
2 8 C. B. 115.
3 Little v. Hackett, 116 U. S. 366; Masteson v. Railway Co., 84 N. Y. 247.

trol of the horse, and plaintiff, having no reason to doubt his efficiency in driving, cannot be imputed to her in an action against him for injuries due to obstruction negligently left in the street.

STATUTE OF LIMITATIONS IN MORTGAGE FORECLOSURE.

1. Limitation of Actions to Foreclosure.
2. Limitations in Equity.
3. Rebuttal of Presumption of Payment.
4. Limit of Less than Twenty Years
5. Effect of Outlaw of Debt on Right to Foreclose Mortgage.
6. Exceptions to the General Rule—Special Statutes.
7. Effect of Covenant to Apply Debt on Right to Foreclosure.
8. Effect of Statute of Limitations where Mortgage Executed by Surety.
9. Delay in Foreclosing Presumption.
10. Statute Contracts.

1. *Limitation of Actions to Foreclosure.*—The New York Code of Civil Procedure,[1] and all codes modeled after it, provide that all actions upon sealed instruments must be commenced within twenty years after the cause of action accrued.[2] An action to foreclose a mortgage is an action upon a sealed instrument, within the meaning of the code, and will not be barred until twenty years have elapsed from the time the mortgage became due and payable, or from the date of the last payment made upon it. Where the mortgagor has made payments upon the mortgage within twenty years from the time it became due, the presumption of payment, declared by the statute to arise after the lapse of twenty years from the date when the right of action accrued, is not available as a defense in an action of foreclosure.[3] But independent of written law there is a period after which, upon the common law principles, from which the statutes of limitation have been deduced, a demand founded upon a note, bond or judgment, becomes irrecoverable. It is a general rule that forbearance for twenty years unexplained, unaccounted for, and unrebutted, will extinguish a judgment as well as all other pecuniary demands.[4]

2. *Limitations in Equity.*—While statutes of limitation are, as a general rule, applicable as such only in proceedings at law, yet courts of equity, acting by analogy, will, in proceedings where they have concurrent jurisdiction with courts of law, apply statutes of limitation and refuse to grant relief where it appears that the statutory period, within which an action might have been maintained at law, has elapsed.[5] This has been the settled rule of decision in the English courts of chancery for the last century and a half.[6] But in some of the American States it is held that in equity the lapse of time operates only by way of evidence, as affording a presumption of payment,[7] while other States hold that courts of equity are bound by the statutes of limitation as much as the courts of law.[8] In

[1] N. Y. Code Civil Procedure, §§ 380, 381.

[2] *Id.* 381.

[3] New York Life Ins. & Trust Co. v. Covert, 3 Abb. Ct. App. Dec. (N. Y.) 350; s. c., 3 Trans. App. 24; 6 Abb. (N. Y.) Pr. N. S. 154, reversing s. c., 29 Barb. (N. Y.) 435.

[4] Gulick v. Loder, 13 N. J. L. (1 J. S. Gr.) 68; s. c., 23 Am. Dec. 711. See also Boardman v. DeFoster, 5 Conn. 1; Buchanan v. Rowland, 5 N. J. L. (2. South.) 72; Cohen v. Thomson, 2 Mills (S. C. Const.), 146; Wells v. Washington, 6 Munf. (Va.) 532; Ross v. Darby, 4 Munf. (Va.) 428; Willaume v. Gorges, 1 Campb. 217; Flower v. Bolingbroke, 1 Str. 639.

[5] See Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90; s. c., 11 Am. Dec. 417; Livington v. Livingston, 4 Johns. Ch. (N. Y.) 287; s. c., 8 Am. Dec. 562; Morgan v. Morgan, 10 Ga. 297; Sloan v. Graham, 85 Ill. 26; Castner v. Walrod, 83 Ill. 171; Kane v. Herrington, 50 Ill. 239; Manning v. Warren, 17 Ill. 267; Clay v. Clay, 7 Bush (Ky.), 95; Bank of United States v. Dallam, 4 Dana (Ky.), 574; Fenwick v. Macey, 1 Dana (Ky.), 276; Thomas v. White, 3 Litt. (Ky.) 177; Smith v. Carney, 1 Litt. (Ky.) 295; Ashley v. Denton, 1 Litt. (Ky.) 86; Frame v. Kenny, 2 A. K. Marsh. (Ky.) 145; s. c., 12 Am. Dec. 367; Breckenridge v. Churchill, 3 J. J. Marsh. (Ky.) 12; Brunk v. Means, 11 B. Mon. (Ky.) 214; Rogers v. Moore, 9 B. Mon. (Ky.) 401; Ayres v. Waite, 64 Mass. (10 Cush.) 72; Ayer v. Stewart, 14 Minn. 97; McCleane v. Shepherd, 21 N. J. Eq. (6 C. E. Gr.) 76; Neely's Appeal, 85 Pa. St. 387; Shelby v. Shelby, Cooke (Tenn.), 179; s. c., 5 Am. Dec. 686; Cocke v. McGinnis, 1 Mart. & Yerg. (Tenn.) 361; s. c., 17 Am. Dec. 809; Pitzer v. Burns, 7 W. Va. 63, 69; Carroll v. Green, 92 U. S. (2 Otto) 509; bk. 23, L. ed. 738; Wagner v. Baird, 48 U. S. (7 How.) 258; bk. 12, L. ed. 681; Badger v. Badger, 2 Cliff. C. C. 137; Willis v. Robinson, 4 Bligh, 119.

[6] See Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90; s. c., 11 Am. Dec. 417; Cocke v. McGinnis, 1 Mart. & Yerg. (Tenn.), 361; s. c., 17 Am. Dec. 809; Sturt v. Mellish, 2 Atk. 610; Lockey v. Lockey, Prec. Ch. 518; Hovenden v. Annesley, 2 Sch. & Lef. 607, a leading case, in which all the American and English cases are distinguished; overruling Coster v. Murray, 5 Johns. Ch. (N. Y.) 522; Love v. Watkins, 40 Cal. 547.

[7] See Livingston v. Livingston, 4 Johns. Ch. (N. Y.) 287; s. c., 8 Am. Dec. 562.

[8] See Shelby v. Shelby, Cooke (Tenn.), 179; s. c., 5 Am. Dec. 686.

California,[9] Missouri,[10] Nevada[11] and Oregon,[12] the statutes of limitations are expressly made applicable to all suits and actions.

In actions to foreclose mortgages, courts of equity, following the analogy of the statute of limitations,[13] regard suits as barred after the lapse of twenty years, where the mortgagor has been permitted to remain in possession without accounting, without any payment of interest, or promise to pay, or acknowledgment that the mortgage is still existing.[14] Payment being presumed after the lapse of twenty years,[15] it must be accepted as conclusive by the court and the jury. In the absence of any evidence to explain the delay or rebut the presumption,[15a] the lapse of twenty years constitutes a complete defense to a foreclosure proceeding.[16]

The grantee of a mortgagor may avail himself of the bar of the statute of limitations as a defense to an action to foreclose whenever the mortgagor could have set up such defense.[17] But the possession must be conclusive and adverse,[18] for until the possession of the mortgagor is shown to be adverse, the right to foreclosure is not barred by twenty years of such possession.[19]

The general rule is, that where an action upon a legal title to land would be barred by the statute of limitations, courts of equity will apply like limitations to suits founded upon equitable rights to the same property.[20]

3. *Rebuttal of Presumption of Payment.*—The presumption of payment after the lapse of twenty years may be rebutted[21] by showing payment of interest, a promise to pay, or an acknowledgment by the mortgagor,[22] and the like.[23] But where relationship is shown between the parties, this may rebut the presumption of payment by the lapse of time. Thus, where the holder of a mortgage permitted his mother, who was the mortgagor, and his sister, to whom the mother conveyed the equity, to occupy the premises for more than twenty years, and he testified, without contradiction that the mortgage debt had not been paid, and that he permitted such occupancy by his mother and sister because of the relationship, it was held that the proof to rebut the presumption of payment was ample and explicit.[24]

When the statute of limitations is complete, any act of the mortgagor which revives the debt also revives the lien of the mortgage, unless the parties agree otherwise,

[9] Love v. Watkins, 40 Cal. 517; Boyd v. Blankman, 29 Cal. 19; Lord v. Morris, 18 Cal. 484.

[10] Kelly v. Hurt, 61 Mo. 463.

[11] White v. Sheldon, 4 Nev. 280.

[12] Anderson v. Baxter, 4 Oreg. 105; Oreg. Code Civ. Proc. § 378.

[13] McDonald v. Sims, 3 Ga. 383.

[14] Harrington v. Slade, 22 Barb. (N. Y.) 151; Bailey v. Jackson, 16 Johns. (N. Y.) 210; Giles v. Baremore, 5 Johns. Ch. (N. Y.) 545; Livingston v. Livingston, 4 Johns. Ch. (N. Y.) 287; s. c., 8 Am. Dec. 562; Swart v. Service, 21 Wend. (N. Y.) 36; Perkins v. Cartnell, 4 Harr. (Del.) 270, 275; s. c., 43 Am. Dec. 753; Records v. Melson, 1 Houst. (Del.) 139; Van Duyn v. Hepner, 45 Ind. 589; Jarvis v. Albro, 67 Me. 310; Sheafe v. Gerry, 18 N. H. 245; Howard v. Hildreth, 18 N. H. 105; Downs v. Sooy, 28 N. J. Eq. (1 Stew.) 55; Ludlow v. Van Camp, 6 N. J. Eq. (2 Halst.) 113; s. c., 11 Am. Dec. 529; Wanmaker v. Van Buskirk, 1 N. J. Eq. (1 Saxt.) 685; s. c., 23 Am. Dec. 748; Gulick v. Loder, 3 N. J. L. (1 J. S. Gr.) 68; s. c., 23 Am. Dec. 711; Todd's Appeal, 24 Pa. St. 429; Bank of United States v. Biddle, 2 Pars. Cas. (Pa.) 31; Henderson v. Lewis, 9 Serg. & R. (Pa.) 379; s. c., 11 Am. Dec. 733; Ordinary v. Steedman, Harp. L. (S. C.) 287; s. c., 18 Am. Dec. 652; Yarnell v. Moore, 3 Coldw. (Tenn.) 176; Carter v. Wolfe, 1 Heisk. (Tenn.) 700; Anderson v. Settle, 5 Sneed (Tenn.), 203; Atkinson v. Dance, 9 Yerg. (Tenn.), 424; s. c., 30 Am. Dec. 422; Rogers v. Judd, 5 Vt. 236; s. c., 26 Am. Dec. 301; Booker v. Booker, 29 Gratt. (Va.) 605; s. c., 26 Am. Rep. 401; Hughes v. Edwards, 22 U. S. (9 Wheat.) 489; bk. 6, L. ed. 142. See also *ante*, § 55, *et seq.*

[15] See Giles v. Barremore, 5 Johns. Ch. (N. Y.) 545; Dunham v. Minard, 4 Paige Ch. (N. Y.) 441; Borst v. Boyd, 3 Sandf. Ch. (N. Y.) 501; Jarvis v. Albro, 67 Me. 310; Downs v. Sooy, 28 N. J. Eq. (1 Stew.) 55.

[16] Brock v. Savage, 31 Pa. St. 422; King's Ex'rs v. Coulder's Ex'rs, 2 Grant Cas. (Pa.) 30; Cope v. Humphreys, 14 Serg. & R. (Pa.) 21; Lesley v. Nones, 7 Serg. & R. (Pa.) 410; Tilghman v. Fisher, 9 Watts (Pa.), 422; Bellas v. Lavan, 4 Watts (Pa.), 297.

[16] Goodwyn v. Baldwin, 59 Ala. 127; Castner v. Walrod, 83 Ill. 171; s. c., 25 Am. Dec. 369; Downs v. Sooy, 28 N. J. Eq. (1 Stew.) 55.

[17] Baldwin v. Boyd, 18 Neb. 449.

[18] Moore v. Cable, 1 Johns. Ch. (N. Y.) 386; Crook v. Gleen, 30 Md. 55.

[19] Sheafe v. Gerry, 18 N. H. 245.

[20] Askew v. Hooper, 28 Ala. 634; Haskell v. Bailey, 22 Conn. 569; Sloan v. Graham, 85 Ill. 27; Kane Co. v. Herrington, 50 Ill. 232, 239; Crook v. Glenn, 30 Md. 55; Cheever v. Perley, 93 Mass. (11 Allen) 584; Elmendorf v. Taylor, 23 U. S. (10 Wheat.) 152, 168; bk. 6 L. ed. 289.

[21] Jarvis v. Albro, 67 Me. 310; Cheever v. Perley, 93 Mass. (11 Allen) 584; Hendrickson v. Decon, 1 N. J. Eq. (1 Saxt.) 685; Booker v. Booker, 29 Gratt. (Va.) 605; s. c., 26 Am. Rep. 401.

[22] See Kernett v. Portfield, 56 Ia. 412; Day v. Baldwin, 34 Ia. 380.

[23] Cook v. Parham, 63 Ala. 456; Colddaugh v. Johnson, 34 Ark. 312; Butler v. Hagadone, 45 Mich. 390; Howard v. Hildreth, 18 N. H. 105; Murphy v. Coates, 33 N. J. Eq. (6 Stew.) 424; Suavely v. Pickle, 29 Gratt. (Va.) 27; Pears v. Laing, L. R. 12 Eq. 41.

[24] Philbrook v. Clark, 77 Me. 176.

or unless such revivor affects the rights of purchasers and mortgagees acquiring title after the bar is complete, and before the act of revivor.[25] Where a mortgagor conveys the equity of redemption, and ceases to pay interest on the mortgage note, the regular payment of interest by the grantee does not operate to prevent the running of the statute of limitations against the liability of the mortgagor on the note.[26]

4. *Limit of Less than Twenty Years.*—It has been held that the lapse of even a less number of years than twenty will be sufficient to raise a presumption of payment. Thus, it was said, in Henderson v. Lewis,[27] that a presumption of the payment of a bond may be raised by a lapse of less than the statutory period of twenty years, when taken in connection with other evidence, but that in the absence of other circumstances the full statutory period must expire to raise the presumption.[28] And in another case[29] the court say that, "as to what amount of time alone, divested of other circumstances, shall be of weight sufficient to authorize a jury to presume payment, unless the presumption be rebutted, is necessarily arbitrary as a rule, and based upon grounds of public policy. Sixteen years having, in the case referred to,[30] been adopted, and society having acted on it for many years, it would be improper, we think, to question the correctness of the rule." [31]

5. *Effect of Outlaw of Debt on Right to Foreclose Mortgage.*—It is a prevailing doctrine of the courts that, where a mortgage has been given to secure the payment of a simple contract debt, a statute limiting the time within which to commence an action for the recovery of such debt is no bar to an action for the foreclosure of the mortgage,[32] because the mortgage remains in full force until the debt is paid which it was given to secure.[33] The statute of limitations simply takes away the remedy but does not otherwise affect the parties.[34]

[25] Johnson v. Johnson, 81 Mo. 331.

[26] Trustees of Almhouse Farm v. Smith, 52 Conn. 434.

[27] 9 Serg. & R. (Pa.) 379; s. c., 11 Am. Dec. 733.

[28] See also Lesley v. Nones, 7 Serg. & R. (Pa.) 410; Husky v. Maples, 2 Coldw. (Tenn.) 25; Leiper v. Erwin, 5 Yerg. (Tenn.) 97; Freeman on Judgments, §§ 464, 465; 2 Greenl. Ev. § 528.

[29] Atkins v. Dance, 9 Yerg. (Tenn.) 424; s. c., 30 Am. Dec. 422.

[30] Blackburne v. Squib, Peck (Tenn.), 64.

[31] See also, Yarnell v. Moore, 3 Coldw. (Tenn.) 176; Carter v. Wolfe, 1 Heisk. (Tenn.) 700; Anderson v. Settle, 5 Sneed (Tenn.), 203.

[32] Gilette v. Smith, 18 Hun (N. Y.), 110; Heyer v. Pruyn, 7 Paige Ch. (N. Y.) 465; s. c., 34 Am. Dec. 355; Pratt v. Higgins, 29 Barb. (N. Y.) 277; Ware v. Curry, 67 Ala. 274; Scott v. Ware, 64 Ala. 174; Bizzell v. Nix, 60 Ala. 281; s. c., 31 Am. Rep. 38; Birnie v. Main, 29 Ark. 591; Hough v. Bailey, 32 Conn. 288; Haskell v. Bailey, 22 Conn. 573; Belknap v. Gleason, 11 Conn. 160; s. c., 27 Am. Dec. 721; Baldwin v. Norton, 2 Conn. 163; Browne v. Browne, 17 Fla. 607; Elkins v. Edwards, 8 Ga. 325; Ætna Life Ins. Co. v. Finch, 84 Ind. 301; Crooker v. Holmes, 65 Me. 195; s. c., 20 Am. Rep. 687; Joy v. Adams, 26 Me. 330; Lingan v. Henderson, 1 Bland Ch. (Md.) 236, 282; Balch v. Onion, 58 Mass. (4 Cush.) 559; Eastman v. Foster, 49 Mass. (8 Metc.) 19, 24; Thayer v. Mann, 36 Mass. (19 Pick.) 537; Webber v. Ryan, 54 Mich. 70; Powell v. Smith, 30 Mich. 451; Michigan Ins. Co. v. Brown, 11 Mich. 265; Wilkinson v. Flowers, 37 Miss. 312; s. c., 66 Am. Dec. 600; Trotter v. Erwin, 27 Miss. 772; Bush v. Cooper, 26 Miss. 599, 611; Trustees of Jefferson College v. Dickson, 13 Miss. (5 Smed. & M.) 650; Miller v. Helm, 10 Miss. (2 Smed. & M.) 687, 688; Wood v. Augustine, 61 Mo. 46; Cookes v. Culbertson, 9 Nev. 199, 208; Mackie v. Lansing, 2 Nev. 302; Read v. Edwards, 2 Nev. 265; Henry v. Confidence Gold Mining Co., 1 Nev. 319; Cathart v. Dettrick, 91 N. C. 344; Myer v. Beal, 5 Oreg. 130; Fisher v. Mossman, 11 Ohio St. 42, 46; Ballou v. Taylor, 14 R. I. 277; Richmond v. Aiken, 25 Vt. 324; Cerney v. Pawlot, 66 Wis. 262; Knox v. Galligan, 21 Wis. 470; Wiswell v. Baxter, 20 Wis. 680; Bank of Metropolitan v. Guttschlick, 39 U. S. (14 Pet.) 19; bk. 10 L. ed. 335; Sparks v. Pico, 1 McAl. C. C. 497; Toplis v. Baker, 2 Cox C. C. 118, 123; Spears v. Hartley, 3 Esp. 81. In an early New York case, however, it was intimated by Justice Sutherland that a mortgage to secure a simple contract debt, was presumed to be paid in six years, because the statute of limitations, at the expiration of that time, might be pleaded to a suit upon a note. See Jackson v. Sackett, 7 Wend. (N. Y.) 94. But this was clearly *obiter dicta*, and has since been denied in several New York cases. In Heyer v. Pruyn, 7 Paige Ch. (N. Y.) 465; s. c., 34 Am. Dec. 355, Chancellor Walworth says that it "certainly cannot be law." At least, that such a principle cannot apply in a case where the real security upon the land is separated from the personal responsibility of the mortgagor by a sale of the equity of redemption upon execution. In the case of Pratt v. Higgins, 29 Barb. (N. Y.) 277, the general term of the third district flatly overruled the doctrine implied in Judge Sutherland's remarks in Jackson v. Sackett, and held, in regard to the precise facts, that the debt secured be a sealed mortgage, and an unsealed note, instead of a bond, may be enforced by a foreclosure of the mortgage after the expiration of six, but before the expiration of twenty years from the time when the debt become due. The court say: "The debt is the principal thing, and the note is one form of the surety for, or evidence of, the debt, and the mortgage another." See also, Borst v. Corey, 15 N. Y. 505, 510; Jones v. Merchants' Bank of Albany, 4 Robt. (N. Y.) 221; Belknap v. Gleason, 11 Conn. 160; s. c., 27 Am. Dec. 721; Baldwin v. Norton, 2 Conn. 163; Thayer v. Mann, 36 Mass. (19 Pick.) 537; Topliss v. Baker, 2 Cox C. C. 123; Spears v. Hartley, 3 Esp. 81.

[33] Joy v. Adams, 26 Me. 330.

[34] Waltermire v. Westover, 14 N. Y. 16. See Borst

The remedy on a mortgage is not lost because a personal action upon the note is barred by the statute of limitations. The remedy on the mortgage is generally available until the payment of the note is shown, or may be presumed, or until the mortgagor has remained in possession for twenty years without recognizing the mortgage.[35] But it is held that the right to enforce the lien of an equitable mortgage is barred by the statute of limitations applicable to the debt secured.[36]

6. *Exceptions to General Rule — Special Statutes.*—In California, Illinois, Iowa, Kansas, Nebraska and Texas, it is held that where an action on the note secured by a mortgage is barred, the remedy on the mortgage is gone. The courts of these States hold that separate remedies may be pursued but that the same limitations apply to both.[37] And in these States it is held that the purchaser from a mortgagor subsequent to the execution of the mortgage may plead the statute of limitations as a defense to an action commenced after the statute has run against the debt secured.[38] In these States the debt is not discharged by the statute or the right or obligation taken away; the statute simply takes away the remedy;[39] the debt remaining unsatisfied and unextinguished and is a sufficient consideration to support a new promise.[40]

The present English statute of limitations, it is said, however, not only bars the right but destroys the remedy also; does not simply exclude the recovery, but transfers the estate.[41]

v. Corey, 15 N. Y. 505, 510; Pratt v. Higgins, 29 Barb. (N. Y.) 277; Jones v. Merchants' Bank of Albany, 4 Robt. (N. Y.) 221; Baldwin v. Norton, 2 Conn. 163; Thayer v. Mann, 36 Mass. (19 Pick.) 537; Myer v. Bell, 5 Oreg. 13.

[35] Ballou v Taylor, 14 R. I. 277.

[36] Borst v. Corey, 15 N. Y. 505; Wayt v. Carwithen, 21 W. Va. 516.

[37] Lent v. Morrill, 25 Cal. 492; Coster v. Brown, 23 Cal. 142; Keinlin v. Castro, 22 Cal. 100; McCarthy v. White, 21 Cal. 495; Lord v. Morris, 18 Cal. 482; Emery v. Keigan, 94 Ill. 543; Brown v. Rockhold, 49 Ia. 282; Clinton Co. v. Cox, 37 Ia. 570; Hubbard v. Missouri Valley Life Ins. Co., 25 Kan. 172; City of Fort Scott v. Schulenberg, 22 Kan. 649; Schmucker v. Sibert, 18 Kan. 104. But see Cheney v. Woodruff, 20 Neb. 124; Hurley v. Cox, 9 Neb. 230; Blackwell v. Barnett, 52 Tex. 326; Daggs v. Ewell, 3 Wood C. C. 344.

[38] Lent v. Shear, 26 Cal. 361; Grattan v. Wiggins, 23 Cal. 17; McCarthy v. White, 21 Cal. 495.

[39] Grant v. Burr, 54 Cal. 298; Sichel v. Carrillo, 42 Cal. 493.

[40] Sichel v. Carrillo, 42 Cal. 497, 498.

7. *Effect of Covenant to Pay Debt on Right to Foreclose.*—As affected by the running of the statute of limitations against the debt, there is a distinction to be observed between those mortgages which do and those which do not covenant for the payment of the debt. A suit to foreclose a mortgage not containing a covenant to pay the debt is barred when the debt secured by it is barred.[42] Thus a suit to foreclose a mortgage, given to imdemnify the mortgagee on account of liability as a surety for the mortgagor, but containing no covenant to pay, is barred by the same lapse of time, from the date a cause of action accrues, that bars the debt it was given to secure.[43] But, except as it is affected by the statute of limitations, a mortgage has the same effect as any other security for a debt, whether it does or does not contain an express promise to pay.[44]

8. *Effect of Statute of Limitations where Mortgage Executed by Surety.*—In those cases where the consideration upon which a mortgage is given is to secure certain notes, upon which the owner of the mortgaged premises is in no way liable, the general rule is that to entitle the mortgagee to enforce such mortgage obligation it is essential that the obligation against the principal must be subsisting. The extinguishment of the direct agreement of the principal, no matter how accomplished, extinguishes the collateral liability of the surety.[45]

In such a case, when the statute of limitations runs against the debt of the principal, there being no longer any subsisting obligation to which the mortgage is collateral, the office of the mortgage is performed, "unless," as remarked in a recent case, "it can be maintained on foot as an independent security."[46] In a recent Indiana case the court say that "if from the lapse of time the presumption is to be indulged that the notes secured by the mortgage had been paid, then

[41] Fearnside v. Flint, 48 L. T. (N. S.) 154; Harver v. Dugall, 1 McQueen, 321.

[42] Lilly v. Dunn, 96 Ind. 220.

[43] Lilly v. Dunn, 96 Ind. 220.

[44] Jouchert v. Johnson, 108 Ind. 436.

[45] Bridges v. Blake, 106 Ind. 332; s. c., 4 West. Rep. 486; Baker v. Merriam, 97 Ind. 539; State v. Blake, 2 Ohio St. 147. See Mount Pleasant Bank v. Conway, 18 Ohio, 234.

[46] Bridges v. Blake, 106 Ind. 332; s. c., 4 West. Rep. 486. See Roschert v. Brown, 72 Pa. St. 372; Sage v. Story, 40 Wis. 575.

although the mortgage itself may have been barred by the statute of limitations, it becomes *functus officio* as completely as though the notes had actually been paid."[47] Where suit was brought on the bond of a public officer, given to secure faithful performance of his official duties, it was held that such bond was merely a collateral obligation and could exist no longer than the liability it was created to secure,[48] because it is of the essence of a contract of suretyship that there be a subsisting valid obligation of the principal debtor, for without a principal there can be no accessory; and by the extinction of the liability of the former the latter becomes extinct.[49]

9. *Delay in Foreclosing—Presumption.*—A mortgage is not necessarily presumed paid from lapse of time, if the mortgagee asserted his right to foreclose in due season, and there does not appear to be any adverse holding under the mortgagor.[50] And a mortgage will not be presumed to be satisfied merely from the lapse of twenty years, before filing a complaint in foreclosure, where partial payments of principal or interest were made on the debt before the lapse of twenty years.[51] And where the presumption that the mortgage has been paid is raised by the lapse of time, it may be rebutted by circumstances.[52]

While a mortgage will be presumed to be satisfied after the lapse of twenty years, where nothing appears to the contrary,[53] yet, in the absence of a statute fixing a less period, the conclusive presumption of payment does not arise at an earlier date than twenty years after the last payment of principal or interest;[54] but it has been said by the Supreme Court of Illinois, that a court of equity will often treat a less period of time than twenty years as a presumptive bar to the recovery.[55]

Payment of a mortgage debt is not conclusively presumed from the lapse of many years, but there must be decisive proof that it is an existing lien to warrant a decree of foreclosure.[56] And no conclusive presumption of payment will arise from mere lapse of a time less than that prescribed by the statute of limitations; yet the fact that a mortgagee has neglected to assert his rights for any considerable period will be evidence, together with other circumstances, that payment has been made. Thus, in a case where the mortgagee had taken no steps to enforce his lien, and made no demand for nineteen years previous to the trial, it was said that the jury would have been warranted to presume the debt satisfied.[57]

There is held to be a manifest distinction between those cases where length of time operates as a bar to an action, and those in which it can be used only as matter of evidence. In the first class it may be pleaded in bar and is conclusive though the debt be not paid, but when relied upon as mere evidence of payment it only raises a presumptive fact which may be repelled by other circumstances to be considered in arriving at the truth.[58]

The mortgagee will not lose his right to foreclose the mortgage by lapse of time where there has been a payment of interest,[59] an acknowledgment of the indebtedness,[60] or a promise sufficient to take the case out of the statute of limitations,[61] or where the statute

[47] Bridges v. Blake, 106 Ind. 332; s. c., 4 West. Rep. 486.

[48] See State v. Black, 2 Ohio St. 147; Walton v. United States, 22 U. S. (9 Wheat.) 651; bk. 6, L. ed. 182.

[49] See State v. Blake, 2 Ohio St. 147; Russell v. Failor, 1 Ohio St. 329.

[50] Baldwin v. Cullen, 51 Mich. 33.

[51] Cook v. Parkham, 63 Ala. 456.

[52] Philbrook v. Clark, 77 Me. 176; Baent v. Kemercutt, 57 Mich. 268.

[53] Wilson v. Albert, 89 Mo. 537.

[54] Peck v. Williams, 10 N. Y. 509; Moore v. Cable, 1 Johns. Ch. (N. Y.) 386; Lock v. Caldwell, 91 Ill. 417; Boone v. Pierrepont, 28 N. J. Eq. (1 Stew.) 7; Hutsonpiller v. Stover, 12 Gratt. (Va.) 579, 588; Sadler v. nnedy, 11 W. Va. 187.

[55] Castner v. Walrod, 83 Ill. 171.

[56] Cowie v. Fisher, 45 Mich. 629.

[57] Jackson v. Pratt, 10 Johns. (N. Y.) 381, 387.

[58] Bailey v. Jackson, 16 Johns. (N. Y.) 210; Jackson v. People, 12 Johns. (N. Y.) 242; Jackson v. Pratt, 10 Johns. (N. Y.) 392; Shields v. Pringle, 2 Bibb (Ky.), 389; Howland v. Shurtleff, 43 Mass. (2 Metc.) 26; s. c., 35 Am. Dec. 384; Inches v. Leonard, 12 Mass. 379; Allen v. Everly, 24 Ohio St. 97; Bissell v. Jandon, 16 Ohio St. 498; Brobst v. Brock, 77 U. S. (10 Wall.) 519; bk. 19, L. ed. 1002.

[59] Haight v. Avery, 16 Hun (N. Y.), 252; Pears v. Laing, L. R., 12 Eq. 41.

[60] Chase v. Higgins, 1 T. & C. (N. Y.) 229; Howard v. Hildreth, 18 N. H. 105.

[61] N. Y. Code Civ. Proc., § 395. See Kincade v. Archibald, 73 N. Y. 189, affirming s. c., 10 Hun (N. Y.), 9; Fiske v. Hibbard, 45 N. Y. Sup. Ct. (13 J. & S.) 331; Shipley v. Abbott, 42 N. Y. 443; Winchell v. Hicks, 18 N. Y. 559; Murray v. Coster, 20 Johns. (N. Y.) 576; s. c., 11 Am. Dec. 333; Fletcher v. Updike, 5 T. & C. (N. Y.) 513; s. c., 67 Barb. (N. Y.)

of limitations has been prevented from running by the existence of statutory disability.

Where a judgment of foreclosure and sale has been entered this is not a merger of the debt, it is simply a means of enforcing the lien of the mortgage, which remains until the debt is paid or discharged; and the lien, notwithstanding the decree, is subject to be defeated by the presumption of payment founded upon a lapse of time the same as if no decree had been entered.[62] If, however, it be held that by virtue of the decree a new security is given, the same presumption of payment arises after the lapse of twenty years without an attempt to enforce the decree by a sale.[63] Upon this principle it has been held that where there has been a foreclosure and sale but no conveyance to the purchaser or any recognition of the mortgage by the mortgage debtor, that it will be presumed after the lapse of twenty years that the land has been redeemed from such sale.[64]

10. *Statute Controls.*—The principle of the statute of limitations applies in those States where the period of limitation has by statute been reduced to less, or increased to more than twenty years the same as in those States, which, following the statute of James I., fix the period at twenty years.[65] The different States have fixed various periods of limitation for bringing of actions upon sealed instruments, including mortgages; thus the California code fixes the period at four years;[66] in Connecticut, fifteen years;[67] Florida, seven years;[68] Iowa, ten years;[69] Montana Territory, three years;[70] Oregon, ten years;[71] Pennsylvania, twenty-one years;[72] South Carolina, twenty years;[73] Wyoming Territory, twenty-one years.[74]

In New York and States with similar codes the statute of limitations differs from the statute of James I., and the statute of limitations in those States which follow it, in this, that the statute of James I., and of those other States apply in their terms, only to particular remedies and are enforcible in law only; courts of equity are said not to be bound by them except in cases of concurrent jurisdiction and when they do enforce such statutes are said to act merely in analogy to the statutes of limitation, and not in obedience to them.[75] In New York, and those States where the distinction between actions at law and suits in equity, and the forms of those actions and suits have been abolished, the statute controls those actions which have heretofore been denominated legal or equitable. The New York statute is pre-emptory, and requires that suits on sealed instruments shall be commenced within twenty years.[76] This statute bars an action to enforce the lien of a mortgage as much as it bars an action on the note or bond, and no help can be given by the court to the plaintiff, unless facts are alleged in the complaint and shown by the proof which bring his case within the exceptions prescribed by the statute itself. No presumption of payment can control, for presumptions may be rebutted; the court must refuse to enforce a lien after twenty years whether the debt has been paid or not.

In this respect the rule in New York and other code States differs from that in those States proceeding upon a different principle. Thus, in Maine, where a presumption of payment of the mortgage debt arises from the possession of the mortgaged premises by the mortgagor or his assign for more than twenty years after the naturity of the debt, where the holder of a mortgage permitted his mother, the mortgagor, and his sister, to

364; 3 Hun (N. Y.), 450. Under the provisions of codes generally, a new promise, in order to take the deed out of the statute of limitations, must be in writing, signed by the party to be charged. See N. Y. Code Civ. Proc., § 395; Scott v. Ware, 64 Ala. 174; Alabama Code, § 3220.

[62] Barnard v. Onderdouk, 98 N. Y. 158; Brown v. Frost, 10 Paige Ch. (N. Y.) 243.

[63] Barnard v. Onderdouk, 98 N. Y. 158; Reynolds v. Dishon, 3 Ill. App. 173.

[64] Reynolds v. Dishon, 3 Ill. App. 173.

[65] Haskell v. Bailey, 22 Conn. 569; Newman v. DeLorrimer, 19 Ia. 244; Martin v. Bowker, 19 Vt. 526; Richmond v. Aiken, 25 Vt. 324.

[66] N. Y. Code Civ. Proc., § 337.

[67] Haskell v. Bailey, 22 Conn. 569.

[68] Laws of Florida, § 10, ch. 1869; Browne v. Browne, 17 Fla. 607.

[69] Newman v. DeLorimer, 19 Ia. 244; Crawford v. Taylor, 42 Ia. 260; Iowa Rev. Code, § 2740.

[70] National Mining Co. v. Powers, 3 Mont. 344; Laws of 1872, p. 516; Montana Code 514, §§ 3, 4.

[71] Eurbanks v. Leveridge, 4 Sawy. C. C. 274; Oregon Civ. Code, § 5.

[72] 10 Serg. & R. (Pa.) 147; McCoy v. Trustee, etc., 4 Serg. & R. (Pa.) 302; Act of March 26, 1785; 2 Sm. L. 299. The statute of 21 Jac. 1, ch. 16, was not extended to Pennsylvania, so that prior to the act of March 26, 1785, the period of limitation in that State was sixty years.

[73] Nichols v. Briggs, 18 S. C. 473; S. C. act of 1880, amending code.

[74] Compiled Laws of 1876, ch. 13, § 8.

[75] Lord v. Norris, 18 Cal. 482.

[76] N. Y. Code Civ. Proc., §§ 380, 381.

whom the mother had conveyed the equity, to occupy the premises for more than twenty years, without payment of the debt or of the interest, and he had refrained from asking for the interest or enforcing the mortgage because the mortgagor was his mother, it was held to rebut the presumption of payment, and that the mortgage could enforced.[77]

[77] Philbrook v. Clark, 77 Me. 176.

MUNICIPAL CORPORATIONS — TELEPHONES — CHARGES — PUBLIC USE — STATE CONTROL.

CITY OF ST. LOUIS V. BELL TELEPHONE CO. OF MISSOURI

Supreme Court of Missouri, December 20, 1888.

1. *Municipal Corporations—Telephones—Charges.* A city has not the right to fix the annual charge for the use of telephones therein, unless such power is found in a reasonable and fair construction of its charter.

2. *Telephones—Public Use—State Control.* — The property of a telephone company is devoted to a public use, and the company exercises special franchises and privileges, and the State can prescribe a maximum rate for the telephone service.

BLACK, J., delivered the opinion of the court:

This was a prosecution against the Bell Telephone Company of Missouri for the violation of an ordinance which provides that "the annual charge for the use of the telephone in the city of St. Louis shall not exceed $50."

A violation of the ordinance is made a misdemeanor, and subjects the offender to a fine of not less than $50 nor more than $500. The defendant appealed from a judgment assessing a fine of $300 against it. The defendant is a corporation organized under article 5 of chapter 21 of the Revised Statutes of this State, and hence has all the powers therein conferred upon such corporations. Among others they have the power to own and operate lines of telephone, to make such reasonable charges for the use of the same as they may establish, to erect their poles along and across public roads and streets, to condemn private property for a right of way, and they are charged with the duty of receiving and transmitting messages with impartiality and good faith. The defendant neither affirms nor denies the power of the State itself to fix a maximum rate of charges, but does contend that no such power has been delegated to the city of St. Louis. The defendant's property, consisting of poles, wires, fixtures and the like, is, of course, private property; but the property is devoted to public use, and since the defendant has conferred upon it special franchises and privileges, including the right of eminent domain, the corporation is subject to public regulations; and we shall take it for granted that the State has the power to fix and prescribe a maximum rate for telephone service. That this power could be delegated to municipal corporations is equally clear. The ordinances of the city of St. Louis must not be in conflict with the general laws of the State. If the city has had this power to fix rates conferred upon it, then an ordinance which fixes reasonable maximum rates would not be in conflict with the law under and by virtue of which the defendant is organized, and which law constitutes its charter.

A telephone company, when once its poles are planted and wires stretched on or over the streets of a city, becomes in effect a monopoly, and the company must submit to such reasonable regulations as the municipal corporation has power to prescribe. The important question, then, is whether the city of St. Louis has the power to enact the ordinance in question, the power to fix reasonable maximum charges for telephone service, and nothing to the contrary being shown in this case, it is assumed that the rate fixed is reasonable, so that the question is narrowed down to one of power on the part of the city to fix telephone rates at all. If the city has such power it must be found in a reasonable and fair construction of its charter. Judge Dillon makes this full and comprehensive statement of the rule as to municipal powers: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: (1) Those granted in express words. (2) Those necessarily or fairly implied in or incident to the powers expressly granted. (3) Those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." 1 Dillon Municipal Corporations, (3d ed.) § 89. See also St. Louis v. McLaughlin, 49 Mo. 562. The rule, as before stated, is in accord with what we said in the City of St. Louis v. Herthel, 88 Mo. 128. The city places some reliance on its general power to regulate the use of streets. This power extends to new uses as they spring into existence from time to time, as well as to uses common and known at the time of the dedication or grant of the power to the municipal corporation. Ferrenbach v. Turner, 86 Mo. 416. The erection and maintenance of telephone poles is one of new uses; such use is a proper use of the streets. Julia Building Association v. Bell Telephone Company, 88 Mo. 258. That the company is subject to reasonable regulations prescribed by the city, as to planting its poles and stringing its wires and the like is obvious. Such regulations have been obeyed by this defendant. Conceding all this we are at a loss to see what this power to regulate the use of the streets has to do with the power to fix tele-

phone charges. The power to regulate the charges for telephone service is neither included in nor incidental to the power to regulate the use of streets, and the ordinance cannot be upheld on any such ground. By the fifth subdivision of section 26, article 3 of the charter of St. Louis, the mayor and assembly have power "to license, tax and regulate lawyers, doctors, etc., etc., telegraph companies as corporation, etc., etc., and all other business, trades, avocations or professions whatever." Telephone companies are not mentioned, though a vast number of trades, professions and avocations are specified. They are not mentioned in all probability because not existing at the date of the charter. In construing this paragraph of the charter we held in the case of City of St. Louis v. Herthel, *supra*, that architects were, for purposes of construction, *ejusdem generis* with lawyers, doctors, dentists and artists, and therefore includes by the general concluding words. So in this case it may with equal propriety be said that telephone companies are *ejusdem generis* with telegraph companies, and therefore included in the words of the general concluding clause.

It can make no sort of difference that these telephone companies were not in existence at the date of the charter. One of the objects had in view by the use of the general clause was to provide for just such cases. As aptly observed in that case, "we are to construe it (the charter) according to the intent of the framers, and that intent must be gathered from the language and objects of the charter provisions, and giving that language and interpretation neither strict nor strained." Does then the power to regulate telephone companies, when that term is coupled with the powers to license and tax, give the city the power to regulate the charges for telephone service? By the general statutes of Massachusetts of 1860, page 167, it is provided that the mayor and aldermen of any city may make rules and orders for the regulations of carriages, and may receive $1 annually for each license granted to a person to use a carriage in the city. Under this power it was held, in Commonwealth v. Gage, 114 Mass. 328, that a city might fix the compensation to be charged by hackney coachman. This case would at first seem to furnish some authority for the claim made by the city in this case. Turning to other provisions of the charter we find that express power is given to establish ferry rates; to fix the rates for carriage of persons, and of wagonage, drayage and cartage of property; to regulate the price of gas, and to regulate and control railways within the city as to their fares, hours and frequency of trips. These express powers to fix prices, fares and charges, in these specified cases, are followed by no general words. With this specific enumeration of cases where the city may regulate the compensation to be charged, it impliedly appears, that such a power was not intended to be given in other cases. This conclusion presents itself with more force when we see that by the clause before quoted the city has power to license, tax and regulate private carriages, omnibuses, carts, drays and other vehicles; so that the framers of the charter did not regard the power to license, tax and regulate sufficient to give the power to fix rates and charges. The power to regulate, it may be conceded, gives the city the right to make police regulations as to the mode in which the designated employment shall be exercised. 1 Dillon on Municipal Corporations, § 358. But taking these charter provisions together we think it would be going to an extreme length to say that they confer upon the city the power to fix telephone rates. If it has power to do this, it may also fix the charges for telegraph services and for the other designated services which are of a public character. We conclude that the city has no power to pass the ordinances in question by reason of any of the charter powers before considered. This brings in the general welfare clause, which is in these words: "Finally, to pass all such ordinances, not inconsistent with the provisions of this charter or the laws of the State, as may be expedient, in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures, and to enforce the same by fines," etc. Sometimes the power to enact ordinances is given in general terms, and in other cases there is a specific enumeration of the powers. "This difference," says Dillon, "is essential to be observed, for the power which the corporation would possess under what may be termed the welfare clause, if it stood alone, may be qualified, or where such intent is manifest, impliedly take away by provisions specifying the particular purposes for which by-laws may be made." 1 Dillon, Municipal Corporations, (3d ed.) § 315. Under a general power like the one now in question this court has held that the city may pass ordinances concerning vagrants, prohibiting persons from keeping open their places of business on Sunday, and prohibiting cruelty to dumb animals. St. Louis v. Schoenbush, 95 Mo. 618, and cases cited. These matters are all within police regulations, strictly speaking, and naturally fall within the domain of municipal legislation and regulation. To say that under this general power the city may fix rates for telephone services would be going entirely too far. This conclusion is manifest when we consider that the charter points out with particularity those cases in which the city may fix rates and charges. What has been said in respect of the power to license, tax and regulate applies with equal force here. We are not cited to, nor have we found, any adjudicated case which will support the ordinance now under consideration under the present charter powers of the city of St. Louis. The judgment in this case is therefore reversed.

NOTE.—In this decision the court has confined itself to an interpretation of the charter of the city of St. Louis, reviewing the law applicable to city charters very thoroughly. There are other questions in such cases which should not be ignored.

Obligation of Contracts.—Often the action of a legislature is hampered by the provision in the United States constitution against impairing the obligation of contracts.[1] Such contracts may arise in favor of a corporation under the provisions of its charter, whether it is created under a special act or under a general incorporation law.[2] In order to present such an impediment, the power is often reserved to alter, repeal or amend such incorporation act. In such cases it is difficult to define the power of the State. It cannot take away or destroy rights which have become vested in the corporation by a legitimate use of its powers. But it may exercise its power to almost any extent to carry into effect the original purposes of the grant and to secure the due administration of its affairs, or which will not defeat nor substantially impair the object of the grant or any rights vested under it, as the legislature may deem expedient to secure that object or any other public or private rights.[3]

Legislative Control.—The legislature is only authorized to regulate the charges for the use of telephones because telephones are devoted to a public use. "Property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but as long as he maintains the use, he must submit to the control."[4] Other authorities hold that only when some privilege in the bestowal of the government is enjoyed in connection with the property, is it affected with a public interest in any proper sense.[5] Such power of regulation is not a power to destroy. Under pretense of regulating, a legislature cannot require a railroad corporation to carry persons or property without reward.[6] The privilege of charging the rates which the railroad deems proper is a franchise, which may be taken away under the reserved power of amending or altering its charter; but the right to charge a reasonable compensation would remain as a right under the general law governing natural persons, and not as a special franchise or privilege.[7] If the legislature can regulate, it has the right to establish the maximum charge. It is not a matter for judicial determination.[8] If the law is unjust or inexpedient, the remedy is in legislation, and not in the courts.[9] Where, however, the legislature has not regulated the matter, it is for the courts to determine what are reasonable rates.[10] The right of a State to reasonably limit the amount of charges by a railroad company for the transportation of persons and property within its jurisdiction cannot be granted away by its legislature, unless by words of positive grant or words equivalent in law.[11]

The right to fix, regulate and receive tolls does not take away the State power to act upon the reasonableness of such charges.[12] In case of doubt, whether by grant or otherwise the State has bargained away its power to regulate the charges of a railroad, the right is construed to remain in the State.[13]

Telephones.—The State has a right to prescribe the maximum price which a telephone company shall charge for the use of its telephones.[14] Such companies must serve all persons alike, and may be compelled to place their instruments in any place of business upon a tender of their charges.[15]

The patent of the telephone gives the exclusive right to make, use and vend the tangible property brought into existence by a practical application of the discovery covered by the letters patent for a limited time; but the right must be exercised in subordination to the local regulations established by the State. All the instruments and appliances used by a telephone company in its business are in legal contemplation devoted to a public use.[16] However, it has been held, that if the telephone company is dissatisfied with such regulations and withdraws its instruments from the State, that the citizens of such State may be debarred the use of telephones, since such use is an infringement of the company's patent.[17]

S. S. MERRILL.

1 U. S. Const. art. 1, § 10.

2 Miller v. State, 15 Wall. 478.

3 Holyoke Company v. Lyman, 15 Wall. 500; New Orleans v. Great S., etc. Co., 26 Cent. L. J. 233, and note.

4 Munn v. Illinois, 94 U. S. 126.

5 Ladd v. Southern, etc. Co., 53 Tex. 172; Cooley's Const. Limit. (5th ed.) 739; dissenting opinion, Munn v. Illinois, *supra*.

6 Railroad Commission Cases, 116 U. S. 331.

7 Peik v. Chicago, etc. R. Co., 94 U. S. 164.

8 Munn v. Illinois, *supra*.

9 Hockett v. State, 105 Ind. 250.

10 Chicago, etc. R. Co. v. Iowa, 94 U. S. 155.

11 Stone v. Farmer's, etc. Co., 116 U. S. 307; Chicago, etc. R. Co. v. Iowa, *supra*.

12 Stone v. Farmer's, etc. Co., *supra*.

13 Railroad Commission Cases, 116 U. S. 307.

14 Hockett v. State, *supra*.

15 State v. Telephone Co., 17 Neb. 126; State v. Telephone Co., 36 Ohio St. 296.

16 Hockett v. State, *supra*.

17 American, etc. Co. v. Cushman, etc. Co., 36 Fed. Rep. 488.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ADMIRALITY—State Courts.— Jurisdiction of State courts of a suit, in case for damages caused by fires from a burning scow, is clearly preserved by the judiciary act. — *Chappell v. Bradshaw*, U. S. S. C., Oct. 29, 1888; 9 S. W. Rep. 40.

2. APPEAL— Assignment of Error. —— Where, in the assignment of errors, only errors occurring at the trial are complained of for which a new trial is prayed, but the action of the court below in overruling the motion is not assigned for error, no question is properly raised in the appellate court. — *First N. Bank v. Jaffrey*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 626.

3. APPEAL—Bill of Exceptions—Signing.—— Where a bill of exceptions is meager, inaccurate and partial, omitting important evidence, and condensing into four and one half pages of manuscript over 100 pages of type-writing, the judge will not be required to sign or amend the bill. — *Sansome v. Myres*, S. C. Cal., Nov. 19, 1888; 19 Pac. Rep. 577.

4. APPEAL — Findings by Judge — Review. —— The findings of a judge on questions of fact, where the evidence is conflicting, are conclusive on appeal.—*Missouri P. R. R. v. Colquitt*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 603.

5. APPEAL—Forcible Entry and Detainer. —— An appeal lies to this court from the municipal court of Minneapolis, in actions of forcible entry and unlawful detainer. — *Boston B. Co. v. Bugington*, S. C. Minn., Nov. 13, 1888; 40 N. W. Rep. 361.

6. APPEAL—Justices — District Court. —— No appeal lies from a judgment of a district court in a case appealed from a justice, under Texas laws, where the fine imposed is less than $100. — *Johnson v. State*, Tex. Ct. App., Nov. 14, 1888; 9 S. W. Rep. 611.

7. APPEAL—Matters not of Record.—— On appeal the court cannot notice affidavits showing the circumstances under which the action was dismissed below, when it is not shown that said affidavits were used in that court.—*Pardy v. Montgomery*, S. C. Cal., Nov. 2, 1888; 19 Pac. Rep. 530.

8. APPEAL—New Trial—Discretion. —— The granting of a new trial will not be reversed on appeal, unless there appears to have been an abuse of the discretion of the trial court, — *Smith v. Champagne*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 398.

9. APPEAL—New Trial—Discretion. —— Where a new trial was granted, but the grounds on which the court granted it do not appear in the record, but errors sufficient for such action do appear therein, such order granting the new trial will not be disturbed.— *Barney v. Dudley*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 550.

10. APPEAL—Orders at Chambers. —— Under Dakota law, anappeal direct from an order at chambers cannot be sustained.—*Bostwick v. Knight*, S. C. Dak., Oct. 1, 1888; 40 N. W. Rep. 344.

11. APPEAL— Orders — Record. —— Upon an appeal from an order error is not disclosed from the fact that the moving papers, upon which the order was made, do not contain averments of prior proceedings in the same cause, of which the court will take judicial notice. — *Rees v. Lowenstein*, S. C. Minn., Nov. 16, 1888; 40 N. W. Rep. 370.

12. APPEAL— Order — Vacating Arrest. —— An order refusing to vacate an order of arrest does not come within the law providing for the review, on appeal from final judgment, of any intermediate order involving the merits. — *Hurst v. Samuels*, S. C. S. Car., Oct. 29, 1888; 7 S. E. Rep. 822.

13. APPEAL—Record— Errors. —— Instructions given and refused, but not incorporated in the bill of exceptions, will not be considered on appeal.— *Witcher v. Watkins*, S. C. Colo., Oct. 26, 1888; 19 Pac. Rep. 540.

14. APPEAL—Record—Correction. ——The rule of the supreme court allowing the correction of errors in the transcript by the clerk's certificate of so much of the record as may be necessary, does not apply to the case of failure to procure from the trial judge a sufficiently full statement of the case. — *Fagan v. Carty*, S. C. Cal., Nov. 19, 1888; 19 Pac. Rep. 584.

15. APPEAL—Remanding—Court of Appeals. —— The amount involved not exceeding $2, 500, and title to real estate not being involved, nor any question conferring jurisdiction on the supreme court, the case is transferred to the court of appeals. — *Schultz v. Tatum*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 633.

16. APPEAL—Review—Objections not Raised. —— The question, whethe the defendant was a resident of the county where sui was brought, not having been raised in the county court, will be considered waived. — *Colorado C. R. R. v. Caldwell*, S. C. Colo., Oct. 26, 1888; 19 Pac. Rep. 542.

17. APPEAL—Review — Weight of Evidence. —— This court will not interfere with a verdict for the defendant on the ground that it is against the evidence, unless it satisfactorily appears that the verdict was the result of corruption, prejudice or passion.— *Caruth v. Richeson*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 633.

18. APPEAL— Waiver of Objections. —— One who reserves exceptions to an order directing him to answer an amended complaint within a specified time, and also complies with the order, thereby waives the right of exception.— *Barber v. Briscoe*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep 589.

19. APPEAL — Weight of Evidence. —— The evidence sustains the judgment, which is affirmed. — *Parker v Freeman*, S. C. Colo., Oct. 31, 1888; 19 Pac. Rep. 601.

20. APPEAL — Weight of Evidence. —— The evidence warranted the finding of the jury and the verdict will not be disturbed. — *Gross v. Watkins*, S. C. Colo., Oct. 26, 1888; 19 Pac. Rep. 539.

21. APPEAL—Weight of Evidence. —— Where a question of fact is submitted to a jury, and there is competent evidence tending to establish such fact, the verdict of the jury is conclusive.— *Cavender v. Fair*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 638.

22. APPEAL—Weight of Evidence. —— Where the defense is a counterclaim, which is supported by one witness and denied by the plaintiff, a finding for plaintiff cannot be disturbed on appeal.— *Denver F. B. Co. v. Platt*, S. C. Colo., Oct. 16, 1888; 19 Pac. Rep. 536.

23. ARREST—Slander of Title—Discharge.—— An order of arrest, under Code N. C. § 291, upon a complaint alleging slander of title, should be vacated, when the facts are vaguely alleged in the complaint.—*Harris v. Sweeden*, S. C. N. Car., Nov. 5, 1888; 7 S. E. Rep. 801.

24. ASSIGNMENT FOR CREDITORS—Notice—Debtors.—— If a debtor without actual notice of an assignment for the benefit of creditors, though it has been duly published, pays the assignor, he will be discharged from the debt. — *Graham v. Evans*, S. C. Minn., Nov. 13, 1888; 40 N. W. Rep. 368.

25. ASSIGNMENT FOR CREDITORS — Fraudulent Preferences. —— Under Michigan law, a bill which alleges that the assignee in an assignment for the benefit of creditors advised a fraudulent mortgage of the assignor's property, may be maintained to set it aside and prevent its payment, without previously obtaining an order of court requiring the assignee to institute the proceedings. — *Burnham v. Haskins*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 327.

26. ASSIGNMENT FOR CREDITORS— Preferences.——A, while in New York, executed a mortgage on his stock of goods in South Carolina to his wife for money ad-

vanced, and two days later two mortgages to a former partner to secure demanded notes, which were substituted for notes not due. All parties returned to South Carolina and in a few days A surrendered the property to the mortgagees and left the State: *Held*, that the mortgages amounted to a general assignment, under South Carolina law, and were void as giving preferences.— *Meinhard v. Strickland*, S. C. S. Car., Oct. 29, 1888; 7 S. E. Rep. 838.

27. ASSUMPSIT — Work and Labor — Evidence. —— A was working under B, a contractor, and fearing he would not be paid, was about to leave when the agent of the railroad induced him to continue to work under promise to pay him. The greater part of the work was then done: *Held*, that a verdict against the railroad, for an amount nearly equal to plaintiff's whole claim for work done before as well as after the promise, should be set aside. — *Galveston etc. R. R. v. Howrin*, S. C. Tex., Nov. 13, 1888; 9 S. W. Rep. 661.

28. BANKS—National — Attachment. —— The federal statutes prohibit the issuance of writs of attachment by the State courts before final judgment against national banks or their property. — *First N. Bank v. La Due*, S. C. Minn., Nov. 20, 1888; 40 N. W. Rep. 367.

29. BANKRUPTCY — Fraudulent Conveyances. —— An assignee in bankruptcy may bring suit to set aside an assignment made by the bankrupt, which though not declared void by the provisions of the bankrupt law, has been made with intent to hinder and delay creditors.—*Means v. Dowd*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 65.

30. BASTARDY—Legitimacy—Witness.— The presumption of the legitimacy of the child of a married woman may be rebutted in bastary proceedings by facts showing the non access of the husband, and, under North Carolina law, the wife may testify thereto. — *State v. McDowell*, S. C. N. Car., Nov. 12, 1888; 7 S. E. Rep. 785.

31. BILLS AND NOTES—Consideration — Usury. —— A note given for a sum agreed to be paid for procuring a loan, and not shown to be unreasonable in amount or a cover for usury, is presumptively valid. — *Thomas v. Miller*, S. C. Minn., Nov. 8, 1888; 40 N. W. Rep. 358.

32. BILLS AND NOTES—Contract—Parol Evidence.—— The true relation of parties to a negotiable instrument may, as between themselves, be proven by parol, whenever it is necessary to a correct determination of the right or liability of either of them thereon, and this may be done to enable a party to seek an instrument to maintain an action thereon in the United States court. — *Goldsmith v. Holmes*, U. S. C. C. (Oreg.), Nov. 5, 1888; 36 Fed. Rep. 484.

33. BILLS AND NOTES—Indorsers— Liability.——Where the second indorser of a note writes his name before instead of after that of a prior indorser, he cannot recover of the latter the amount paid in taking up the note after its dishonor. — *Sweet v. Powers*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 471.

34. BONDS—Subcontractor—Liability.— C contracted to erect a building, and he sublet a portion of his contract to B, who gave a bond to C "for the use of all persons who may do work or furnish material pursuant" to C's contract. B failed to pay for materials and C was by law compelled so to do: *Held*, that a cause of action accrued to C on the bond.— *Cassan v. Maxwell*, S. C. Minn., Nov. 16, 1888; 40 N. W. Rep. 357.

35. BOUNDARIES — Evidence. —— B, who purchased land from A, saw A at that time run his boundary line, which constituted the boundary line, the location whereof was in dispute: *Held*, that B was not competent to testify as to its location, it not being shown that A was the surveyor who originally located it, nor that A was dead.—*Alexander v. Gossett*, S. C. S. Car., Oct. 12, 1888; 7 S. E. Rep. 814.

36. BROKERS — Real Estate - Commission. —— The plaintiff under the evidence failed to procure a purchaser for the defendant's property and was not entitled to a commission. — *Sloman v. Bodwell*, S. C. Neb., Nov. 14, 1888; 40 N. W. Rep. 321.

37. CARRIERS—Connecting Lines—Damages. —— Defendant issued round trip tickets to a point on a connecting line; its train was taken over the connecting line by the engineer of the latter and in charge of its employees: *Held*, that defendant was liable for injuries to passenger caused by the negligence of such employees.— *Washington v. Raleigh & G. R. R.*, S. C. N. Car., Nov. 5, 1888; 7 S. E. Rep. 789.

38. CARRIERS—Delay in Shipment—Evidence.——In a suit for damages caused by delay in carrying potatoes, which were shipped at a season when it was turning cold, it is error to exclude evidence as to what was said, when the contract of carriage was made, about the length of time it would require to reach the destination. —*Blodgett v. Abbott*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 491.

39. CARRIERS—Passengers— Regulations. —— A railroad company may adopt a rule, that no passenger shall be allowed on a through freight train without a written permit from the superintendent. — *Thomas v. Chicago, etc. R. R.*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 463.

40. CARRIERS— Use of Depot — Agency. —— When a railroad regularly enters and departs from the depot of another company, intrusting to the latter the handling and checking of the baggage of its passengers, furnishing its own checks therefor, the latter company must be deemed the agent of the former relative to such business. — *Ahlbeck v. St. Paul, etc. R. R.*, S. C. Minn., Nov. 20, 1888; 40 N. W. Rep. 364.

41. CARRIERS—Warehouseman—Liability. ——Where goods upon their arrival are allowed to remain till the railroad becomes liable only as a warehouseman, and the owner is informed by the railroad agent that they have not arrived, and they are destroyed by fire, the railroad is liable for the value of the goods. — *Union P. R R. v. Moyer*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 630.

42. CERTIORARI—School-district— Establishment.—— The action of the board of county commissioners in forming a new school-district cannot be reviewed on *certiorari*.—*Lemont v. County Commrs.*, S. C. Minn., Nov. 13, 1888; 40 N. W. Rep. 359.

43. CHATTEL MORTGAGE—Description of Property.—— A mortgage held to be a chattel mortgage on growing crops, where the description created a doubt whether the land was not covered thereby. — *Strolberg v. Brandenberg*, S. C. Minn., Nov. 9, 1888; 40 N. W. Rep. 356.

44. CHATTEL MORTGAGE—Trover — Evidence. —— In trover for property taken by defendant under a chattel mortgage, by which he was empowered to take possession when he should deem himself insecure, the mortgage is inadmissible in evidence without producing the note it was given to secure.—*Hill v. Merriman*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 399.

45. COLLISION—Loss of Charter— Damages. —— If an existing charter is lost in consequence of a collision, and a charter at lower rates is necessarily taken for the residue of the charter period, the shipper is entitled to the difference in value of the two charters and also for the crew, who are necessarily under pay on contract during the detention.—*The Belgenland*, U. S. D. C. (N. Y.), Oct. 4, 1888; 36 Fed. Rep. 504.

46. COMMISSIONERS—Fees—Court of Claims. —— When a United States commissioner has complied with the law so far as is in his power by transmitting his account to the district attorney, who presents it to the court, and he is refused a hearing thereon, and no order is entered of approval or disapproval, he may maintain an action for his services in the court of claims.— *United States v. Knox*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 63.

47. CONTRACTS—Conditions Implied.——When a person undertakes any employment, trust or duty, he impliedly contracts to act with integrity, diligence and skill. — *Hart v. Barnes*, S. C. Neb., Nov. 14, 1888; 40 N. W. Rep. 322.

48. CONTEMPT — Habeas Corpus — Commitment. —— Upon an original application to the Supreme Court of the United States for a writ of *habeas corpus* in favor of one committed for contempt by a circuit court, the facts as set forth in the order of the commitment must be regarded as true and cannot be reviewed. — *In re Terry*, U. S. S. C., Nov. 12, 1888; 9 S. C. Rep. 77.

49. CONTRACT—Sale of Realty — Damages.——A complaint against B for failure to convey property, which he contradicted to sell as agent of C, alleging that before the time fixed for the last payment the land had greatly appreciated in value, and praying judgment for its value, is bad on demurrer, since B did not profess to bind himself personally, and there was nothing to show that plaintiff was injured. — *Senter v. Monroe*, S. C. Cal., Nov. 16, 1888; 19 Pac. Rep. 580.

50. COPYRIGHT — Judicial Opinions. —— A State cannot be called a citizen under the copyright law, nor can a judge who officially prepares the head-notes, statement of the case, and opinion, be regarded as an author or proprietor, so as to allow another to obtain a copyright as his assignee. — *Banks v. Manchester*, U. S. S. C., Nov. 19, 1888; 9 S. W. Rep. 36.

51. CORPORATIONS— Agents — Authority. —— Before the president and manager of a milling company, incorporated for the purpose of conversion and sale of agricultural products, can bind the company by the purchase of flour, it must be shown that such purchase came within the scope of its corporate powers, was authorized by it, was rendered necessary for the protection and interest of its milling business, or that some benefit resulted to it.—*Getty v. Barnes M. Co.*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 617.

52. CORPORATIONS—Consolidation— Action.——When a railroad is consolidated with other railroad companies under a new name, an action brought by or against it cannot be prosecuted by or against it in its original name. — *Kansas, etc. R. R. v. Smith*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 636.

53. COVENANTS—Incumbrance—Drainage. —— Under Michigan law, a lien attaches to land as soon as the assessment is made of the ditch tax imposed on lands benefited by drainage.—*Lindsay v. Eastwood*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 455.

54. CRIMINAL LAW—Appeal—Errors.——On an appeal in a criminal case, where no errors are assigned, and there is no brief nor argument, and no error appears from the record, the judgment will be affirmed.—*Ter. v. Mooney*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 595.

55. CRIMINAL LAW — Alibi — Instructions. —— An instruction upon the trial of two defendants for murder, that an *alibi* was very often resorted to by guilty persons, as well as innocent ones, and one in which perjury, mistake, and deception are often committed. — *State v. Chee Gong*, S. C. Oreg., Nov. 13, 1888; 19 Pac. Rep. 607.

56. CRIMINAL LAW— Appeal — Objections to Evidence. —— Unless the record affirmatively shows that the motion to rule out testimony was made before the jury was charged, the action of the trial court therein cannot be reviewed on appeal. — *Wright v. State*, S. C. Ga., Oct. 17, 1888; 7 S. E. Rep. 806.

57. CRIMINAL LAW—Bigamy—Evidence.——In a prosecution for bigamy a marriage may be shown by the testimony of an eye-witness, that a marriage ceremony was performed by one acting in the character of a clergyman or magistrate, in the absence of a statute of the place of marriage requiring greater proof. — *People v. Perriman*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 425.

58. CRIMINAL LAW—Burglary — Jury. —— Under the constitution of Texas, a conviction for burglary upon a trial in the district court before a jury of six must be set aside.—*Jester v. State*, Tex. Ct. App., Nov. 3, 1888; 9 S. W. Rep. 616.

59. CRIMINAL LAW—Burglary—Rape — Evidence. —— Upon examination the evidence does not warrant a conviction for burglary with intent to commit rape. — *Coleman v. State*, Tex. Ct. App., Oct. 31, 1888; 9 S. W. Rep. 609.

60. CRIMINAL LAW—Change of Venue. ——Under Missori law, only one change of venue is allowable in a criminal case.—*State v. Anderson*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 633.

61. CRIMINAL LAW— Conspiracy— Evidence. —— Evidence that defendant and others met in a secluded place in the night, armed and masked, that they discussed the propriety of whipping persons, that they went two miles to a house and killed one of the inmates, and that in defendant's presence instructions were given by one to the others as to their testimony in case they were prosecuted, sufficiently establishes a conspiracy.—*State v. Walker*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 646.

62. CRIMINAL LAW — Experts — Experience.——On a trial for murder by poisoning, a physician, whose only knowledge of poisoning is from books or medical instruction, is not competent to give an opinion relative to the symptoms of the last sickness of the deceased with regard to poison.—*Soquet v. State*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 391.

63. CRIMINAL LAW—Homicide—Bail.——Under the evidence the homicide was not a capital offense, and the accused was entitled to bail.—*Ex parte Rice*, Tex. Ct. App., Nov. 3, 1888; 9 S. W. Rep. 615.

64. CRIMINAL LAW—Homicide—Malice.——On a trial for murder, evidence of a previous difficulty between defendant and deceased is admissible to show express malice.—*Starke v. State*, S. C. Ga., Oct. 17, 1888; 7 S. E. Rep. 807.

65. CRIMINAL LAW—Indictment—Duplicity.——An indictment charging the crime of forgery, under Montana law, in separate counts, the first by falsely making and forgery, the second by falsely uttering and publishing, is bad for duplicity, when there is nothing in the second count to show that the instrument there set out is the same as the one declared on in the first count.—*Ter. v. Poulier*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 594.

66. CRIMINAL LAW—Lost Depositions—Proving Contents.——Where it is shown that certain absent witnesses do not reside in the State, and that their testimony at the examining trial is lost, other persons may testify as to what they swore at the examination.— *Gilbreath v. State*, Tex. Ct. App., Oct. 31, 1888; 9 S. W. Rep. 618.

67. CRIMINAL LAW — Manslaughter. —— If a person, seeing his friend shot down, becomes so aroused by sudden rage and resentment that his mind is not capable of cool reflection, and if, under the immediate influence of his passion, he shoots and kills the offender, the offense is manslaughter.—*Moore v. State*, Tex. Ct. App., Oct. 31, 1888; 9 S. W. Rep. 610.

68. CRIMINAL LAW—Murder—Insult to Female.—— Though it is claimed the defendant killed the deceased for insulting a female relative, yet the jury may find him guilty of murder in the second degree, since the jury may determine from the evidence that the killing had another cause.—*Norman v. State*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 616.

69. CRIMINAL LAW—Murder—Malice—Presumption.—— On a trial for murder in the second degree, malice can be implied only in cases where the killing alone is shown.—*Vollmer v. State*, S. C. Neb., Nov. 21, 1888; 40 N. W. Rep. 420.

70. CRIMINAL LAW—Objections—Waiver.——An objection that there was a variance where the indictment charged an intent to kill the deceased and that the charge that the jury might find the defendant guilty of murder, was erroneous, comes too late in a motion for a new trial.—*Ter. v. Rowand*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 595.

71. CRIMINAL LAW—Perjury—Grand Jury.——A person may be convicted of perjury in testifying before a grand jury, when neither the indictment nor the evidence shows that he made such false statement while testifying under compulsion to facts tending to crimin-

ate himself.—*Pipes v. State*, Tex. Ct. App., Oct. 31, 1888; 9 S. W. Rep. 614.

72. CRIMINAL LAW—Rape—Fabricated Story.——On trial of a man accused of rape upon his daughter, who is the only witness for the people, respondent may show by the evidence of other witnesses, that the daughter has made similar charges falsely against other men, even though the daughter has denied on cross-examination that she made such charges.—*People v. Evans*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 473.

73. CRIMINAL LAW—Rejection of Juror—New Trial.——An objection in a criminal case, that a qualified juror was excused or excluded from serving without any legal reason, appearing for the first time in a motion for a new trial, there being no pretense that the jurors who tried the cause were not qualified, comes too late.—*State v. Jackson*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 624.

74. CRIMINAL LAW—Self-defense—Evidence.——On trial for murder, an omission to charge as to the law of self-defense is not prejudicial error, where the proof shows that defendant shot deceased because the latter would not return his clothes, which deceased had stolen, and that, though deceased had a knife in his hand, he did not attack defendant, nor did defendant shoot because he feared an attack.—*Combo v. Com.*, Ky. Ct. App., Nov. 15, 1888; 9 S. W. Rep. 655.

75. CRIMINAL LAW—Threats—Confessions.——Confessions extorted by personal violence are admissible on a trial for burglary, under Texas law, when defendant at the same time tells where the goods stolen are secreted, which information leads to their discovery.—*Brown v. State*, Tex. Ct. App., Oct. 31, 1888; 9 S. W. Rep. 613.

76. CRIMINAL LAW—Trial—Introduction of Evidence.——In a criminal case the State cannot be permitted to withhold a part of its evidence in chief, and then introduced it in rebuttal after the defendant has rested his case.—*State v. Hunsaker*, S. C. Oreg., Oct. 30, 1888; 19 Pac. Rep. 605.

77. DAMAGES—Proximate—Contract.—The party injured by breach of a contract may recover losses sustained and gains prevented, provided such damages may fairly be supposed to have been within the contemplation of the parties, and are certain in their nature and in respect to the cause from which they proceed.—*Hunt v. Oregon P. R. Co.*, U. S. C. C. (Oreg.), Oct. 29, 1888; 36 Fed. Rep. 481.

78. DEDICATION—Plat.——A town plat of unsurveyed government land, which fails to comply with the requisites of such plats according to law, does not affect a dedication of the streets to public use.—*Diamond M. Co. v. Village of Ontonagon*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 448.

79. DEDICATION—Revocation.——Where the owner of land lays it off in blocks, lots and streets, platting it as an addition to a city, and causes the plat to be recorded, though it is not acknowledged so as to entitle it to record, and conveys any part of it by reference to such plat, he thereby irrevocably dedicates to the public the streets therein named.—*Meier v. Portland C. R. Co.*, S. C. Oreg., Nov. 5, 1888; 19 Pac. Rep. 610.

80. DEED—Appurtenances.——A conveyance of land, with its appurtenances is, by implication, a conveyance of the grantor's interest in a ditch and water-right necessary to the use and enjoyment of the land.—*Tucker v. Jones*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 571.

81. DEED—Condition Subsequent.——A grant of a right of way to a railroad stated that the agreement was made for the location and maintenance of said railroad, and this license shall cease with the non-use of the same for such purpose: *Held*, that such grant is not upon condition subsequent to construct the whole line of road upon the same location as that shown by the survey made and filed by the grantee.—*Morrill v. Wabash, etc. R. Co.*, S. C. Mo., Nov, 12, 1888; 9 S. W. Rep. 637.

82. DEED—Consideration—Power of Attorney.——Under a power of attorney to sell and convey land, a conveyance without any consideration given, or agreed to be given, is a nullity.—*Randall v. Duff*, S. C. Cal., Oct. 23, 1888; 19 Pac. Rep. 532.

83. DEED—Delivery—Presumption.——A deed properly executed, in the possession of the grantee, is presumed to have been delivered.—*Flint v. Phipps*, S. C. Oreg., July 2, 1888; 19 Pac. Rep. 543.

84. DEED—Description—Uncertainty.——A deed describing the land as all that certain tract of land lying on J creek, and bounded on the west by L's survey, and on the north by B's pre-emption survey, is void for uncertainty.—*Coker v. Roberts*, S. C. Tex., Oct. 30, 1888; 9 S. W. Rep. 665.

85. DEED—Escrow—Delivery.——A deed having been put in escrow till certain things were done, which were done within a reasonably time, and in the usual course of business, an attempt by the depositary to detain the deed will not prevent it from taking effect.—*Hughes v. Thistlewood*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 629.

86. DEPOSITIONS—Objections—Time.——Objections to a deposition, going only to the formalities of its execution, must be noted when the deposition is taken, or be raised by a motion to suppress before ths trial is begun, otherwise they are waived.—*Murray v. Larabie*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 574.

87. DIVORCE—Trial—Contempt.——A court may, in its discretion, allow a trial for divorce to proceed, although one of the parties may be in contempt for nonobedience of an order of court.—*Wagner v. Wagner*, S. C. Minn., Nov. 16, 1888; 40 N. W. Rep. 360.

88. DEED—Warranty—Quitclaim.——A grantee in a warranty deed, whose grantor has a warranty deed, and who acts in good faith and without actual notice, is entitled to protection as a *bona fide* purchaser, notwithstanding the existence of a quitclaim deed in the chain of title.—*Sherwood v. Moelle*, U. S. C. C. (Neb.), Oct. 29, 1888; 36 Fed. Rep. 478.

89. DOWER—Renunciation—Vested Estate.—A widow is not barred of dower, even in equity, by renouncing her right of dower in a mortgage given by her husband's executors, such a renunciation being insufficient to pass her completed title.—*Jeffries v. Allen*, S. C. S. Car., Oct. 30, 1888; 7 S. E. Rep. 828.

90. EMINENT DOMAIN—Public Use—Railroads.——When a railroad company cannot reach a large portion of its freighting business with its main line, and is compelled to construct branches to enable it to operate its road, the taking of property necessary therefor is a public use.—*Toledo, etc. R. Co. v. East S., etc. R. Co.*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 436.

91. EQUITY—Cancellation of Contract—Injunction.——Since the parol evidence shows that the contract was signed with no intention of making a contract or binding obligation on the part of either party, equity will decree its cancellation and enjoin its enforcement.—*Olmstead v. Michels*, U. S. C. C. (Mo.), Nov. 5, 1888; 36 Fed. Rep. 455.

92. EQUITY—Cancellation of Lease—Coverture of Lessee.——Equity will not cancel a lease executed on valuable consideration, solely on the ground that a part of the consideration consisted of covenants to be performed by the lessee during the term, for failure to perform which she could not be held personably liable by reason of her coverture, of which fact the lessor had knowledge.—*Dickson v. Kempinsky*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 618.

93. ERROR—Writ of—Parties.——Where it appears that a writ of error is not joined in by all the parties against whom judgment was rendered without a proper summons and severance, the writ will be dismissed by the court of its own motion.—*Estis v. Trabue*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 58.

94. EVIDENCE—Best and Secondary.——Secondary evidence of an instrument is improperly admitted when it is not shown that it once existed, nor that its produc-

tion is out of the party's power.—*Stocking v. St. Paul T. Co.*, S. C. Minn., Nov. 16, 1888; 40 N. W. Rep. 365.

95. EVIDENCE—Declarations—Eminent Domain.——In an action for damages for the appropriation of a right of way through his farm, declarations of plaintiff, made at the time of the appropriation, are competent without first calling plaintiff's attention to them.—*Le Roy & W. R. Co. v. Butts*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 625.

96. EVIDENCE—Deed—Harmless Error.——Where defendant in ejectment admits that the land was then owned by the plaintiff, the admission of a record copy of plaintiff's deed, the original being in his possession elsewhere, is harmless error.—*West v. Cameron*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 616.

97. EVIDENCE—Pleading.——Where the original answer is superseded by an amended answer, the former is improperly admitted in evidence.—*Stern v. Lowenthal*, S. C. Cal., Nov. 16, 1888; 19 Pac. Rep. 579.

98. EXEMPTIONS — Homestead — Crops. —— Cotton grown upon a homestead is not subject to levy and sale under execution until it is severed from the land by gathering.—*Bailey v. Oliver*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 606.

99. EXECUTION—Sale—Land in Another County.——An execution sale by the sheriff of one county of land situated in another county passes no title.—*Terry v. O'Neal*, S. C. Tex., Oct. 26, 1888; 9 S. W. Rep. 673.

100. EXEMPTIONS — Unmarried Man. —— The horse, wagon and harness of an unmarried man, engaged in the business of assaying and sampling ores, are exempt from execution to the extent of $300, under Colorado law.—*Watson v. Lederer*, S. C. Colo., Oct. 31, 1888; 19 Pac. Rep. 602.

101. FRAUDULENT CONVEYANCES—Husband and Wife.——A husband, while solvent, conveyed land to his wife of the value of money belonging to her, which he had used in his own business, with the express agreement that he would return it in land: *Held*, that his creditors could not attack the deed.—*Hackworth v. Johns*, Ky. Ct. App., Nov. 19, 1888; 9 S. W. Rep. 656.

102. FRAUDULENT CONVEYANCE—Husband and Wife.——The deed in question between husband and wife was held not to be void as to creditors.—*Wooden v. Wooden*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 460.

103. FRAUDULENT CONVEYANCE—Knowledge of Purchaser.——Under the evidence the sale of the stock of goods was fraudulent as to creditors, and the purchaser had knowledge thereof.—*Blum v. Simpson*, S. C. Tex., Oct. 30, 1888; 9 S. W. Rep. 662.

104. FRAUDULENT CONVEYANCES — Regularity. —— Where all parties testify that the sale of chattels under a lien and a mortgage were fair, and the sheriff made the sale, and it was regularly advertised, it may be sustained, though it was made hastily and without proper attention to detail, and the goods were not at once removed.—*Magneder v. Clayton*, S. C. S. Car., Oct. 12, 1888; 7 S. E. Rep. 844.

105. FRAUDULENT CONVEYANCE—Trespass.——Under Texas law, a voluntary conveyance of all the property owned by one, who has commenced to trespass on land by cutting timber thereon with intent to continue, is fraudulent as to a judgment recovered, as well for the trespasses before, as after, the conveyance.—*Cole v. Terrell*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 668.

106. GUARDIAN AND WARD—Settlement.——A release, given after maintaining his majority, by a ward to his guardian with a full knowledge of all the facts, will not be set aside.—*Davis v. Hagler*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 628.

107. GARNISHMENT—City—Second-class.——A city of the second-class cannot be garnished.—*Switzer v. City of Wellington*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 620.

108. HOMESTEAD—Execution—Allotment. ——Judgment was entered in 1864, and a sale thereunder was made in 1879: *Held*, that the creditor could satisfy his judgment out of the exempt property if there was not sufficient other property, but the debtor was entitled to have his homestead exemption set off, and to enjoy the part remaining after the satisfaction of the debt, and without such allotment the execution sale was void.—*Morrison v. Watson*, S. C. N. Car., Nov. 12, 1888; 7 S. E. Rep. 795.

109. HUSBAND AND WIFE—Covenants—Estoppel.——In Dakota a married woman who, with her husband, executes a mortgage upon her land, with covenants of seizin, quiet possession and warranty as security for a loan, is estopped from setting up title acquired after a foreclosure sale thereunder, though the mortgage is a mere lien.—*Yerkes v. Hadley*, S. C. Dak. Oct. 5, 1888; 40 N. W. Rep. 340.

110. HUSBAND AND WIFE—Public Land—Community Property.——A and his wife occupied public land from 1847 to 1856, when she died. He continued to occupy it, and received a deed for it in 1871 from the town under act of congress of 1866: *Held*, that the land was not community property, and the wife was vested with no ownership therein.—*Labish v. Hardy*, S. C. Cal., Nov. 8, 1888; 19 Pac. Rep. 531.

111. HUSBAND AND WIFE—Separate Estate—Mortgage.——Georgia law does not prevent a wife from joining with her husband in mortgaging, for her husband's debts, property conveyed by the husband to a trustee for the wife's sole benefit, the trustee being authorized in the deed to mortgage the property on request of the of the husband and wife.—*Brodnax v. Ætna Ins. Co.*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 61.

112. HUSBAND AND WIFE—Separate Property—Mortgage.——When a wife has recorded in the county where she lives a list of her property, according to Montana law she will not, as against her husband's mortgagee, be estopped from claiming it merely by allowing her husband to have possession and control of it, during which possession he executed the mortgage.—*Palmer v. Murray*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 553.

113. INFANT — Guardian's Contract— Rescission.——Where an infant promptly rescinds his guardian's contract on attaining his majority, offering to reconvey on repayment of the money advanced, and sues therefor within three months thereafter, his retention of the property in the meantime is not a ratification of the purchase.—*Scott v. Scott*, S. C. S. Car.. Oct. 12, 1888; 7 S. E. Rep. 811.

114. INJUNCTION—Review—Finding.——An injunction restraining the unlawful erection of a building across a public alley, will not be disturbed on the sole ground that the chancellor erred in finding that complainant had made out a case of special damage.—*Cohen v. Bank of Georgia*, S. C. Ga., Oct. 24, 1888; 7 S. E. Rep. 811.

115. INJUNCTION—Temporary—Wrongs Prevented.——Where a corporation had contracted with another to build its road for certain stock and bonds, but the latter corporation did not build the road in the time appointed, and the stock and bonds were not tendered, and by stratagem and surprise at an adjourned meeting of the first corporation new directors were elected and the road was placed in the hands of others: *Held*, that a temporary injunction would issue against any action of the latter parties.—*New York & B. R. T. Co. v. Parrott*, U. S. C. C. (Conn.), Oct. 23, 1888; 36 Fed. Rep. 462.

116. INSURANCE—Apportionment—Equity.——Where there is a claim against several insurance companies for the same loss upon different policies, a court of equity has jurisdiction to apportion the loss among the respective companies, and require payment from each of the amount for which it is liable.—*Fuller v. Detroit F. & M. Ins. Co.*, U. S. C. C. (Ill.), Oct. 29, 1888; 36 Fed. Rep. 469.

117. INSURANCE—Application—Filling Out.——Where an agent of an insurance company fills out the application, presenting it to the applicant for his signature, but not acquainting him with the contents, the repre-

sentations therein made are conclusive against the company.—*Dunbar v. Phœnix Ins. Co.*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 386.

118. INSURANCE — Life — Application by Agent. —— Where a life insurance agent assumes the responsibility of filling out a blank application, and the applicant, presuming that he has acted honestly, signs it without any knowledge of its contents, a recovery may be had on the policy, though certain representations be materially false.—*Temmink v. Metropolitan L. Ins. Co.*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 469.

119. INSURANCE—Life—Rights of Creditors.—— Insurance on the life of a husband, taken out by the wife, or by him for the benefit of herself and children, in a State whose statutes make the proceeds payable to the wife or children, free from the claims of the husband's creditors, cannot be recovered by such creditors, though the husband was insolvent when the policies were issued and the premiums were paid out of his money.—*Central N. Bank v. Hume*, U. S. S. C., Nov. 12, 1888; 9 S. C. Rep. 41.

120. INSURANCE — Limitations—Minors.——A stipulation in an accident insurance policy, limiting the time within which suit shall be brought, is valid, and runs during the minority of the beneficiaries, there being no exception in their favor.—*Suggs v. Travelers' Ins. Co.*, S. C. Tex., Oct. 26, 1888; 9 S. W. Rep. 676.

121. INTOXICATING LIQUORS—Questions for Jury.—— Under a trial for pursuing the occupation of selling liquor without a license, a charge that different sales at different times, near each other, to different parties, could constitute the occupation of selling, under Texas law, states an incorrect rule, and is a charge on the weight of the evidence.—*McReynolds v. State*, Tex. Ct. App., Nov. 3, 1888; 9 S. W. Rep. 617.

122. INVENTIONS — Infringement — Injunction. —— A telephone patentee, who has put his device into extensive use and is receiving an income therefrom, is entitled to an injunction against its infringement, though he has withdrawn it from a particular State because of legislative interference limiting the rate of charges.—*American, etc. Co. v. Cushman, etc. Co.*, U. S. C. C. (Ind.), Oct. 29, 1888; 36 Fed. Rep. 488.

123. INVENTIONS — Patents — Cancellation. —— The United States can maintain a bill in equity to cancel a patent for an invention obtained through fraud.—*United States v. American B. T. Co.*, U. S. S. C., Nov. 12, 1888; 9 S. C. Rep. 90.

124. INVENTIONS—Pitching Barrels.——Claim No. 1 of patent 42,580, to Holbeck and Gottfried, for pitching barrels is invalid. Claim No. 2 is not infringed by the use of an irremovable conductor in an apparatus for pitching barrels by means of a hot air blast.—*Crescent B. Co. v. Gottfried*, U. S. S. C., Nov. 5, 1888; 9 S. C. Rep. 83.

125. JUDGMENT—Equitable Relief — Injunction.——A borrowed money from a guardian through B, who acted as agent, and to whom as trustee a deed of trust was executed as security. C purchased part of the property, and B agreed to release such part from the deed of trust upon payment of the purchase money to him or to the guardian; it was paid to the guardian: *Held*, that equity would enjoin a judgment in ejectment recovered by the ward after coming of age on a title acquired by purchase under the deed of trust.—*Johnson v. Christian*, U. S. S. C., Nov. 5, 1888; 9 S. C. Rep. 87.

126. JUDGMENT—Motion to Set Aside—Venue. —— A motion to set aside a judgment can only be heard in the county where the action is pending, unless consent appears from written stipulation, or a recital in the order, or by implication from presence at the hearing without objection, and the objection may be taken in the supreme court without objection or assignment of error.—*Goodwin v. Monds*, S. C. N. Car., Nov. 12, 1888; 7 S. E. Rep. 793.

127. JUDGMENT—Non-resident—Service. —— A judgment against a non-resident, who did not appear, on a return not found, no affidavit nor order of publication being found in the record, is a nullity. — *Palmer v. McMaster*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 585.

128. JURY—Payment of Jury Fee.——The Texas law, directing that a demand for a jury shall be made and the jury fee paid upon the first day of the term, is not strictly mandatory.—*Allen v. Plummer*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 672.

129. JURISDICTION—Administratrix.——The administratrix of A, appointed in Nebraska, may sue in Nebraska for damages for the killing of A in Kansas.—*Mo. P. R. Co. v. Lewis*, S. C. Neb., Nov. 23, 1888; 40 N. W. Rep. 401.

130. JURISDICTION—Courts — Military Reservation.—— In Montana, a district court of the Territory has jurisdiction to try an indictment for murder committed on a military reservation.—*Burgess v. Territory*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 558.

131. JURISDICTION—Federal—Crimes.—— The courts of the United States have no common law jurisdiction in criminal cases, nor of an assault with a dangerous weapon on the high seas, unless committed on board of an American vessel.—*United States v. Lewis*, U. S. D. C. (Oreg.), Nov. 10, 1888; 36 Fed. Rep. 449.

132. JUSTICE OF THE PEACE — Jury — Findings. —— Where a judgment is based on a verdict of the jury, it is unnecessary for the justice to make findings of fact.—*Dye v. Russell*, S. C. Neb., Nov. 21, 1888; 40 N. W. Rep. 416.

133. LANDLORD AND TENANT —Lease—Surrender.—— A stipulation in a lease that the lessee will surrender to the lessor when he desires to proceed with contemplated improvements is but a covenant, the breach of which only gives the lessor a right of action for damages.—*Bergland v. Frawley*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 372.

134. LIMITATIONS— Adverse Possession. —— A valid sheriff's sale of land breaks the chain of title of defendant in execution, remaining in possession after the sale and claiming title under the statute of limitations of three years and against the holder of the title, which passed by the sheriff's sale.—*Blum v. Rogers*, S. C. Tex., Nov. 9, 1888; 9 S. W. Rep. 595.

135. LIMITATIONS — Lands — Indians. —— Under Nebraska and federal laws, an Indian may come into the courts and litigate his title to land, and, when he is not shown to be uneducated or unfamiliar with the laws, the statute of limitations will not run against him.—*Felix v. Patrick*, U. S. C. C. (Neb.), Oct. 29, 1888; 36 Fed. Rep. 457.

136. LIMITATIONS—Notes—Payment. —— The maker of a note agreed in writing to send to the payee certain harrows. The payee was to pay the freight and credit $50 on the notes: *Held*, that the indorsement, as affecting the limitation of an action on the notes, was to be made when the freight reached its destination.—*Sutton v. Lamb*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 457.

137. LIMITATIONS—Payment — Presumption. —— The statute providing that a presumption of payment shall arise within ten years after the right of action shall have accrued, only raises a presumption, which may be rebutted.—*Currie v. Clark*, S. C. N. Car., Nov. 12, 1888; 7 S. E. Rep. 805.

138. LIMITATIONS—Real Estate—Running of Statute.—A recovered land by ejectment from B in 1876. B subsequently discovered that A's deed was a forgery, and sued A, but A relied on the former owner's outstanding title, and B could not prove the forgery. In 1882 B sued in equity, setting out the former suits and the facts concerning the forgery: *Held*, that the action is not barred, under Missouri law.—*Dunn v. Miller*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 640.

139. MANDAMUS—Bridge.——The necessary means to rebuild a bridge over a navigable river, which the county is charged with the duty of maintaining, not being in the treasury, and the county board not having been authorized in the manner prescribed by law to levy a tax or issue bonds to raise the same, the board cannot be compelled by *mandamus* to rebuild the bridge.

—*State v. Wood County*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 381.

140. MARITIME LIENS—Goods—Speculation. —— There is no lien for salt purchased by the owners of a steamer to be taken to another port and sold upon execution, the same not having been furnished as supplies.—*The Wyoming*, U. S. D. C. (Mo.), Oct. 20, 1888; 36 Fed. Rep. 493.

141. MARITIME LIENS—Mortgage — Priority. —— The lien of a material man for supplies and repairs furnished in a home port, given by a State statute, is entitled to priority over a mortgage on the vessel repaired, although such mortgage had been duly recorded before such supplies and repairs were furnished.—*Clyde v. Steam T. Co.*, U. S. C. C. (N. Car.), Aug. 18, 1888; 36 Fed. Rep. 501.

142. MARITIME LIEN—Repairs — Personal Credit.—— A shipwright in Jersey City solicited work at the office of the ship owner's representative in New York. The boat was sent to him to be repaired. He took a note on account and afterwards renewed it. He made no claim against the boat for eight or nine months, and after it been mortgaged: *Held* that, under the circumstances, the repairs must be done on personal credit only.—*The James Farrell*, U. S. D. C. (N. Y.), Nov. 1, 1888; 36 Fed. Rep. 500.

143. MARITIME LIEN—Supplies—Presumption.——Material men furnished supplies in New York to a vessel registered in New Jersey, but whose business home was in New York city, upon the order of the charterers, who did business in New York, and who had no authority from the owner to pledge the vessel for supplies: *Held* that, in the absence of any evidence of a common intent to charge the ship, no maritime lien arose for the supplies.—*The Aeronaut*, U. S. D. C. (N. Y.), Oct. 11, 1888; 36 Fed. Rep. 497.

144. MARRIAGE—License—Inquiry.——A, as register of B county, issued a marriage license for two persons in an adjoining county on the application of C. C told A that that the woman's parents were living, that she was eighteen or nineteen years old, and that all the parties lived in the adjoining county: *Held*, that the license was issued without reasonable inquiry, under North Carolina law.—*Williams v. Hodges*, S. C. N. Car., Nov. 5, 1888; 7 S. E. Rep. 786.

145. MASTER AND SERVANT—Negligence—Contributory. ——Defendant had ordered the unloading of a mill from a wagon near a railroad. The driver of the wagon left the horses without unhitching them or blocking the wheels. While the mill was being unloaded the horses were frightened by a passing train, and the mill fell on the plaintiff's foot: *Held*, that the master was not liable.—*Steffen v. Mayer*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 630.

146. MECHANIC'S LIENS—Subcontractor—Notice.—— Under Dakota law, in a mechanic's lien case, where the only evidence on the part of the subcontractor is, that the principal part of the materials was furnished before the notice was given to the owner, no foundation is laid for the introduction of the notice of lien filed with the clerk of the district court, and it is properly excluded. *McMillan v. Phillips*, S. C. Dak., Oct. 1, 1888; 40 N. W. Rep. 349.

147. MORTGAGE—Foreclosure — Marshaling Assets.—— One of two joint mortgagors of an $8,000 mortgage, who sells land to the mortgagee and takes in payment an assignment of a $4,000 interest in the mortgage bond, is entitled, on foreclosure, to have his interest in the mortgage first satisfied.—*Quinnin v. Brown* S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 336.

148. MORTGAGES—Recording. —— In Louisiana, since the act of 1855, an unrecorded mortgage is invalid as to third persons, though they have full knowledge of it.—*Ridings v. Johnson*, U. S. S. C., Nov. 12, 1888; 9 S. S. C. Rep. 72.

149. MORTGAGE—Release—Penalty. —— Where a mortgagor has fully paid the note secured by mortgage without notice that the note had been assigned, the assignment not being recorded, and the mortgagee has failed to release the mortgage within a reasonable time after demand to do so, the mortgagee is liable for the penalty prescribed by law in such cases. — *Perkins v. Matteson*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 633.

150. MUNICIPAL CORPORATIONS — Control of Streets — Changing Grade.——The act of 1883 did not authorize the city of Detroit to bridge railroad tracks for a street crossing, nor to construct an ascending grade of the street to the bridge, and the depreciation of the property fronting on the street, caused by such grading, is a taking of private property for public use, which is authorized only by proceedings to condemn. — *Schneider v. City of Detroit*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 329.

151. MUNICIPAL CORPORATIONS—Debts — Constitution. ——The provision of the constitution of Texas, that no debt shall ever be created by any city unless at the same time provision be made for taxation for its payment, applies to all cities alike. — *City of Terrell v. Dissaint*, S. C. Tex., Nov. 16, 1888; 9 S. W. Rep. 593.

152. MUNICIPAL CORPORATIONS—Fire—Liability.——A city is not liable for damages caused by fire originating in a wooden building erected contrary to its ordinance creating fire limits, though it took no steps to prevent its erection. — *Hines v. City of Charlotte*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 333.

153. MUNICIPAL CORPORATIONS — Street Railroads — Forfeiture. —— An ordinance of a city requiring a street railway company to construct its road in a certain manner and on certain streets, under Wisconsin law becomes a part of its charter, and upon non-compliance it may be required to surrender its charter by *quo warranto*.— *State v. Madison S. R. R.*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 487.

154. NEGLIGENCE— Contributory — Jury. —— Where the plaintiff knew of the excavation across the sidewalk, and passing by on a dark night attempted to go around it, but misjudged the distance and fell in and was injured, it was *held* that the question of contributory negligence was for the jury. — *Village of Orleans v. Perry*, S. C. Neb., Nov. 22, 1888; 40 N. W. Rep. 417.

155. PAYMENT—Check. —— Payment by check is not absolute, but conditional, unless expressly so agreed.—*Good v. Singleton*, S. C. Minn., Nov. 8, 1888; 40 N. W. Rep. 359.

156. PLEADING—Complaint— Demurrer. —— A complaint alleging, that through the default in the payment of interest plaintiff, under an option given in the note, has declared the whole principal and interest immediately due and payable, a demurrer on the ground that the action is prematively brought, does not present the question whether or not the option has been properly exercised.—*Pacific M. L. Co. v. Shepardson*, S. C. Cal., Nov. 16, 1888; 19 Pac. Rep. 583.

157. PLEADINGS—Defects—Verdict. ——Where plaintiff sues a city for damages for injuries sustained by reason of the defective condition of the sidewalk, and does not allege that the city had notice thereof, and the defendant does not demur or move relative thereto, such defect is cured by verdict, though defendant objected to the introduction of any evidence, on the ground that by reason thereof the petition did not state a cause of action. — *Hurst v. City of Ash Grove*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 631.

158. PLEADING — Fraud. —— A party charging fraud and misrepresentation must plead the facts, and a mere allegation thereof is not sufficient. — *Tepoel v. Saunders C. N. Bank*, S. C. Neb., Nov. 21, 1888; 40 N. W. Rep. 415.

159. PLEADING—Mortgage—Foreclosure. ——Where a suit is brought upon certain promissory notes, and to foreclose the mortgage given to secure them, the contents and conditions of the mortgage being alleged and the answer is not verified, and the petition is not attacked by motion, exceptions, or otherwise, the mortgage is to be taken by the court as true and the foreclosure may be decreed.—*Case v. Edson*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 635.

160. PLEADING—Replevin—Mortgagee.——A mortgagee of chattels, who brings an action of replevin against

another mortgagee, without showing the conditions of his mortgage or breach thereof, fails to make out a cause of action.— *Madison N. Bank v. Farmer*, S. C. Dak. Oct. 1, 1888; 40 N. W. Rep. 345.

161. PLEADING — Verification — Clerk. —— A notary public, who is clerk of an attorney, may administer an oath to verify a pleading prepared by such attorney. — *Schuyler N. Bank v. Bollong*, S. C. Neb., Nov. 21, 1888; 40 N. W. Rep. 411.

162. POST-OFFICE—Mail—Fraud.——A person changed the mailing stamp on a letter so as to deceive an insurance company and prevent a forfeiture: *Held*, that the case was not within U. S. Rev. St. § 5480, relative to opening correspondence by mail for purposes of defrauding.—*United States v. Mitchell*, U. S. D. C. (Pa.), Oct. 24, 1888; 36 Fed. Rep. 492.

163. PRACTICE—Fraud—Instructions.——In an action for false representations it is proper to charge that fraud will not be presumed under slight circumstances. — *Sweeney v. Devens*, S. C. Mich., Nov. 1, 1888; 40 N. W Rep. 454.

164. PRACTICE—Jury—Summoning.——The court can call in talesmen to supply a deficiency in the panel, and when there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall by order of the court return jurymen from the by-standers sufficient to complete the panel, under the acts of congress. — *Lovejoy v. United States*, U. S. S. C., Nov. 5, 1888; 9 S. C. Rep. 57.

165. PRACTICE — New Trial — Newly-discovered Evidence.——When in a petition for a new trial it appears that the petitioner has discovered new evidence which, in connection with that given at the trial would entitle him to a judgment, ordinarily a new trial should be granted.— *McDonald v. Early*, S. C. Neb., Nov. 21, 1888; 40 N. W. Rep. 410.

166. PRACTICE— Trial — Exclusion of Evidence.——A court may admit apparently irrelevant testimony upon the promise and theory that evidence will be introduced making it material; if such evidence is not introduced it is the duty of the court upon request to exclude such testimony from the consideration of the jury. — *Martin v. Williams*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 551.

167. PRACTICE—Trial—Instructions. —— The instructions given should be applicable to the issues and facts presented by the evidence.— *Western H. I. Co. v. Throp*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 631.

168. PRACTICE—Trial—Reception of Evidence. —— In an action against a railroad for causing the death of A, after plaintiff has shown that A's death was not caused by his own negligence, and the defendant has confined itself to proving that it was not negligent, the plaintiff can introduce evidence to rebut defendant's evidence as to its negligence.—*Central R. R. & B. Co. v. Nash*, S. C. Ga., Oct. 17, 1888; 7 S. E. Rep. 808.

169. PROHIBITION—Writ of—Remedy at Law.——That a district court has overruled an objection to its jurisdiction and is about to adjudicate the cause on its merits, will not authorize a writ of prohibition. — *People v. District Court*, S. C. Colo., Oct. 31, 1888; 19 Pac. Rep. 541.

170. PRINCIPAL AND AGENT — Notice to Agent. —— A company which employes an agent to sell machinery, stipulating that the notes taken in payment shall be made payable to the company and guaranteed by the agent, is chargeable in an action against the maker with the agent's knowledge in taking a note to it, though not given in payment of a machine.—*Johnston H. Co. v. Miller*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 429.

171. PUBLIC LANDS— Inclosing — Indictment. —— An indictment for unlawfully inclosing a portion of the public lands must show that the defendant is not within any of the exceptions permitting such inclosure. — *United States v. Felderward*, U. S. C. C. (Oreg.), Oct. 29, 1888; 36 Fed. Rep. 490.

172. RAILROADS— Contracts — Regulating Rates. —— Its charter gave a railroad the exclusive right of transportation of persons and property over its road, provided that the charge of transportation or conveyance should not exceed certain rates: *Held*, that the company was subject to subsequent legislation establishing a commission to regulate tariffs.— *Georgia R. & B. Co. v. Smith*, U. S. S. C., Oct. 29, 1888; 9 S. C. Rep. 47.

173. RAILROADS—Crossing— Negligence. —— A party approaching a railroad crossing is not bound to look and listen for the approach of a train, when the train has just passed, while the deceased was in a few rods of the crossing and was driving upon a trot, and such train has passed out of his sight in such manner as to induce the belief that it would not immediately return. — *Duname v. Chicago, etc. R. R.*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 394.

174. RAILROADS— Leases — Liabilities.——A railroad company cannot lease its road to another so as to absolve itself from its duties to the public. — *East Line & R. R. R. v. Lee*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 605.

175. RECEIVERS — Action by Stockholders — Jurisdiction. —— Where stockholders of a corporation sue former directors for losses to the corporation caused by their acts, and the State court which appointed a receiver for the corporation refuses leave to make him a party defendant, the jurisdiction of the federal court fails.—*Porter v. Sabin*, U. S. C. C. (Minn.), Oct. 27, 1888; 36 Fed. Rep. 475.

176. RELIGIOUS SOCIETY — Real Estate — Trust. —— When real estate is purchased by an unincorporated church organization and occupied and improved by it, and the deed is made to one person for the benefit of the organization, a trust is created, which may be enforced, although not in writing, though such person is a bishop of the denomination of which the church is a a part. — *Fink v. Umscheid*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 623.

177. REMOVAL OF CAUSES— Local Prejudice. —— Act Congress 1887, relative to the renewal of causes for local prejudice, repeals by implication the act of 1867 on the same subject. Such application must be made to the federal court and be supported by sufficient proof to satisfy the court of the truth of such allegations. — *Southworth v. Reid*, U. S. C. C. (Wis.), 1888; 36 Fed. Rep. 451.

178. SALE—Rescission— Latent Defect. —— One who purchases by sample a chattel intended for a particular purpose, known to the seller, may even after acceptance rescind the sale on discovering a latent defect. — *Hudson v. Roos*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 467.

179. SEAMEN—Discharge—Fishing Vessel. ——A master and crew wrongfully discharged by the owner of a fishing vessel from employment under a contract for the entire season, wages to be in the ratio of the quantity of fish caught, may recover damages, based upon the amount they would have received as wages on the catch of the whole season, less the amount paid them, and any wages earned during the season after their discharge.—*Fee v. Orient F. Co.*, U. S. D. C. (N. Y.), Sept. 24, 1888; 36 Fed. Rep. 509.

180. SEAMAN—Discharge— Waiver. —— Where a seaman has been wrongfully discharged, and on the same day the master offers to take him back and carry him on the return voyage, a refusal to accept such offer is a waiver of all damages which might be recovered for the wrongful discharge.—*Dary v. The Caroline Miller*, U. S. D. C. (Ala.), Oct. 15, 1888; 36 Fed. Rep. 507.

181. SHIPPING—Charter Party — Performance. —— Under the evidence in this case the shippers were held to have complied with their guarantee in a reasonable time, and were not liable for damages. — *Culliford v. Vinet*, U. S. S. C., Oct. 29, 1888; 9 S. C. Rep. 50.

182. SHERIFF—Receiptor—Liability.——Where a sheriff delivers property, which he has attached, to a bailee, taking a receipt therefor from him, such bailee will not be permitted to question the judgment obtained in the action, in which the property was so attached.—*Holcomb v. Nelson L. Co.*, S. C. Minn., Nov. 9, 1888; 40 N. W. Rep. 354.

183. SPECIFIC PERFORMANCE— Contracts — Certainty

—— A contract, whereby a vendee of land agrees to lay out a town, and reconvey a block to the vendor, including the land on which his house stands, of the average size of the other blocks, not to exceed a certain number of feet square, is too indefinite to be enforced, and the continuance of the vendor in possession is not such part performance as cures the defect. — *Hollenbeek v. Prior*, S. C. Dak., Oct. 1, 1888; 40 N. W. Rep. 347.

184. SPECIFIC PERFORMANCE—Purchase of Land. —— An agreement by the vendee of land in another State to give his note for the purchase price, and secure it by mortgage on the land, may be enforced in equity. — *Hicks v. Turck*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 339.

185. STATUTES — Amendment. —— An act, amending another act, which provides that section 17 of said act is hereby amended so as to read as follows, then setting out the whole section as amended, does not violate the constitution of Missouri.—*Morrison v. St. Louis, etc. R. R.*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 626.

186. STATUTES—Ex Post Facto—Bribery.——Penal Code N. Y. § 72, increasing the penalty for bribery, is void as to such offenses committed in New York city before it took effect, but valid as to such offenses arising after April 1, 1883.—*Jachue v. People*, U. S. S. C., Nov. 12, 1888; 9 S. C. Rep. 70.

187. STATUTES—Titles—Public Buildings.——Act Mich. 1883, as amended in 1885, requiring contractors on public buildings to give bond to pay their laborers, is constitutionally enacted as to title.—*Plummer v. Kennedy*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 433.

188. TAXATION—Personal Tax—Sale of Realty.—— The Colorado law, authorizing the sale of lands for taxes on personality, is not contrary to public policy nor to the constitution.—*Larimer Co. v. National S. Bank*, S. C. Colo., Oct. 26, 1888; 19 Pac. Rep. 537.

189. TAXATION—Retrospective Law.—— A sale under Michigan law of 1885, for taxes of previous years is void, nor can the act of 1887 validate such sales previously made. — *Hall v. Perry*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 324.

190. TAXATION—Sale—Statutes.——A sale made under the Michigan tax law of 1885, for delinquent taxes assessed under the law of 1882, is void. — *McNaughton v. Martin*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 326.

191. TELEGRAMS—Delay—Damages—Party.—— In an action against a telegraph company for failing to deliver a message sent to plaintiff's family physician, calling him to attend plaintiff's wife in her confinement, injury to the wife's feelings is an element of actual damages. The husband is a proper party to bring the suit for such injuries to his wife, and she is not a neces sary party.—*Western U. T. Co. v. Cooper*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 598.

192. TOWAGE—Negligence—Hoisting Sale on Tow.—— A schooner, lashed on the side of the tug, hoisted her foresail which ob cured the view of the pilot of the tug. Subsequently the schooner struck on a reef: *Held*, that the schooner and the tug were both in fault, and the damages should be divided. — *The W. A. Levering*, U. S. D. C. (N. Y.), Oct. 22, 1888; 36 Fed. Rep. 511.

193. TOWNS— Special Legislation. —— The provision in the act, allowing towns to exercise the powers conferred on villages, making it applicable to towns containing villages of a certain population, is not unconstitutional.— *Land L. & L. Co. v. Brown*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 482.

194. TRADE-MARK — Infringement. —— A marked his plug tobacco with a tin star. B maked his tobacco, which differed in size and weight, with a round piece of gilded paper, and there were other differences. There was no evidence of actual deception: *Held*, that B did not infringe A's trade-mark. — *Liggett & M. T. Co. v. Finzer*, U. S. S. C., Nov. b, 1888; 9 S. C. Rep. 60.

195. TRESPASS—Cutting Timber — Personal Representations. —— In an action against the administrator of one who had cut and removed logs from plaintiff's land, only the value of such logs on the stump can be recovered, under Wisconsin law.—*Cotter v. Plumer*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 379.

196. TRESPASS—Cutting Timber—Tax-deed.——A tax-title claimant, who never acquired the actual possession of land cannot recover the penalty of Rev. St. Wis. § 4269, where defendant, the former owner, had no notice when he took the timber, of the recording of the tax-deed. — *Fleming v. Sherry*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 375.

197. TRESPASS—Injury—Gaming Materials. ——Defendant fastened a wire to plaintiff's house to secure a telegraph pole, which caused a part of the wall to fall, and a heavy rain flooded his carpets and gaming tables and implements: *Held*, there being no proof that at that time the property was being used for illegal purposes that the plaintiff was entitled to his damages.—*Gulf, etc. R. R. v. Johnson*, S. C. Tex., Oct. 30, 1888; 9 S. W. Rep. 602.

198. TROVER AND CONVERSION—Certificates of Deposit —Damages.——In an action for the conversion of certificates of deposit, evidence is admissible, that at the time of the alleged conversion payment had been demanded and refused, tending to show their depreciation in value. — *First N. Bank v. Dickson*, S. C. Dak., Oct. 1, 1888; 40 N. W. Rep. 351.

199. USURY—National Bank— Jurisdiction.——A suit, under United States law against a national bank for knowingly taking usury, may be brought in a State court. — *Schuyler N. Bank v. Bolong*, S. C. Neb., Nov. 21, 1888; 40 N. W. Rep. 413.

200. VENDOR AND VENDEE — Fraud — Damages. —— Where one contracts to convey realty, knowing that he has no title and cannot perform his part, the damages may be measured by the rule of compensation for the injury suffered, and may include reimbursement for improvements put upon the estate.—*Erickson v. Bennett*, S. C. Minn., Nov. 7, 1888; 40 N. W. Rep. 157.

201. WAYS—Stakes—Trespass.—— A party, having a right of way over the land of another, has a right to drive stakes along the line thereof to define its limits, if he does no unnecessary damage thereby. — *Joyce v. Conlin*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 212.

202. WIDOW— Allowance — Widow's Allowance — Appeal.——The order of a probate court refusing to review the former order relative to the widow's allowance of a year's support is a final adjudication, unless an appeal is taken from such order.— *Moore v. Moore's Admr.*, S. C. Ohio, Nov. 13, 1888; 18 N. E. Rep. 489.

203. WIDOW—Release—Fraud— Mistake. ——Where a widow releases to an executor, either by his fraud or her mistake, all her interest in the estate for a consideration less than half her interest in the personalty, such release will not preclude her from demanding her full share of the property of the estate.— *Appeal of Cunningham*, S. C. Penn., Oct. 22, 1888; 15 Atl. Rep. 868.

204. WILL—Construction.——A will, by which the testator devises his house and lot, and "all the rest and residue" of his estate, to his wife, "to have and to hold for and during the term of her natural life," gives her only a life estate, though testator died childless, and the wife is spoken of elsewhere in the will as the residuary legatee. — *Mixter v. Woodcock*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 573.

205. WILL—Construction—Curtesy. ——Where by the terms of a will a life estate was given to the husband of the testatrix, and upon his death a certain portion was to be given to E. The husband survived E: *Held*, that husband of E took no estate by the curtesy.— *Webster v. Ellsworth*, S. J. C. Mass., Nov. 26, 1888; 18 N. E. Rep. 569.

206. WILLS—Construction— Devisees. —— A devised land to his five grandsons and to the survivor, and if they died without heirs of their own bodies to their sisters, and each should receive his part when he became 25 years old: *Held*, that the devise to the sisters failed on the arrival of the grandsons at the age of 25 and the division among them.— *Fields v. Whitefield*, S. C. N. Car., Nov. 18, 1888; 7 S. E. Rep. 780.

207. WILL—Construction—Fee-simple—Shelley's Case. A devise of land to "J and to his heirs during his natural life, and to him and to his heirs forever after his decease," vests J with the fee-simple under the "rule in Shelley's case. — *Henderson v. Walthorn*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 893.

208. WILL—Construction—Uncertainty. —— Where a testator devises land to a township which is both a civil and school township and directs the proceeds of the land to be devoted to the support of schools his intention to devise to the school township is clear, and the devise cannot be held void for uncertainty. — *Skinner v. Harrison*, S. C. Ind., Nov. 14, 1888; 18 N. E. Rep. 529.

209. WILLS—Contract to Make— Part Performance.—— Where by parol agreement a husband and wife bind themselves to make a particular disposition of their real estate by will, and such contract is fully performed by the husband and benefits received and accepted by the wife, equity will prevent the wife from violating her part of the contract in fraud of parties interested.—*Carmichael v. Carmichael*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 173.

210. WILLS—Estate Devised — Charges. —— Though the testator charged his wife with the raising and education of his children, yet the estate conveyed was held to be a fee-simple. — *Howze v. Barber*, S. C. S. Car., Oct. 23, 1888; 7 S. E. Rep. 817.

211. Will—Probate—Estoppel. —— A widow is not estopped to elect to take under the law rather than under her husband's will by causing the will to be probated and becoming the executrix thereof. — *In re Givin's Estate*, S. C. Cal., Nov. 1, 1888; 19 Pac. Rep. 527.

212. WITNESS—Cross-examination.—— Refusal to allow defendant to cross-examine plaintiff, to show that the note sued on is without consideration, it is not error, where the plaintiff has given no testimony on the point in chief.—*Brady v. Henry*, S. C. Cal., Nov. 2, 1888; 19 Pac. Rep. 529.

213. WITNESS—Fees.—— No fees can be taxed for the previous attendance of a witness, regularly summoned, who was not present on the day of the trial owing to the sickness of his wife.—*Davis v. Mills*, S. C. Tenn., Jan. 13, 1888; 9 S. W. Rep. 691.

214. WITNESS—Impeachment—Declarations.——Where a witness has been interrogated relative to certain statements contradictory of his testimony, evidence of such statements is admissible, though made after the occurrence which is the subject-matter of the suit. — *Welch v. Abbott*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 223.

215. WITNESS—Party— Cross-examination. —— A defendant in a criminal case sworn as a witness on his own behalf may on cross-examination be asked if he has been convicted of crime.—*State v. Curtis*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 263.

216. Witness—Privilege.—— Where an employee testifies for the State in the trial of his employer for selling intoxicating liquors, witnout any promise, expressed or implied, of immunity, he is not protected from prosecution for the same offense.—*Commonwealth v. Plummer*, S. J. C. Mass., Nov. 26, 1888; 18 N. E. Rep. 567.

217. WRIT—Process—Witness—Privilege. ——A party who attends an application for an injunction in a case in which he is interested is privileged as a witness from the service of process while going to and returning from the place of hearing. — *Andrews v. Lernbeck*, S. C. Ohio, Oct. 16, 1888; 18 N. E. Rep. 483.

218. WRITS—Return—Presumption.——In the absence of proof to the contrary, the presumption of diligence obtains in favor of an officer charged with the service of process, and his return of not found must be regarded as sufficient. — *Liver v. State*, Tex. Ct. App., Oct. 10, 1888; 9 S. W. Rep. 552.

219. WRIT—Secular Newspaper— Publication—Statute. ——Construction of Illinois statutes relative to notice by publication of legal process in a secular newspaper. Publication in a journal partly devoted to legal information and partly to general news: *Held*, to be sufficient notice under the statute.—*Railton v. Lander*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 555.

220. WRITS—Service— Ramsey County. —— The general laws on the subject of service of summons took effect in Ramsey county on repeal of section 2, ch. 185, Sp. Laws 1877.—*Miller v. Miller*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 261.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERY NO. 1.

A mortgages to B, with power of sale, by deed of warranty, either at public or private sale on default made. A dies after default, B assigns mortgage to C, who conveys to D with covenants of warranty *bona fide*, and for a valuable consideration. The heirs of A file bill to redeem on the ground that it was a naked power, unaccompanied with an interest. The power is not recited in the deed from C to D. Will the bill lie? Is it not a power coupled with an interest, and therefore, not necessary to be recited? The bill is brought by a non-resident to make the other heirs defendants. Motion to dismiss is made because plaintiff failed to give bond, but before it is acted on a second heir, on his motion, is made a party plaintiff. Cause is dismissed as to first party, and proceeds in name of second heir. When this is done the seven years' adverse possession has elapsed. Is the cause barred by the statute of limitations? Was not this in reality the bringing of a new suit, or did it refer back to bringing of original suit, which was in apt time?

INQUIRER.

QUERY NO. 2.

Has a divorced wife a legal right to continue the use of her late husband's name. Cite authorities. X.

QUERY NO. 3.

H obtained a judgment in May, 1872, against V, in the justice's court. On June 1, 1872, a transcript of the judgment was recorded in the county recorder's office, and under the statute became a lien on all the real estate owned by V, which lien continues for two years. In July, 1872, H commenced an action in the district court against V on the justice's judgment, and in August, 1872, obtained another, or second judgment, which was docketed, and the lien thereof, under the statutes, continues for two years. Execution was issued on the district court judgment, the land sold and sheriff's deed executed. All this was done within two years from June 1, 1872. But V had, on June 15, 1872, duly executed a deed for the land to C, which deed was then recorded. We have no statutory provisions providing for the merger of the lien of the first in the second judgment, and no writ of *scire facias*. Did the lien of the second judgment relate back to the 1st of June, 1872, or was there any merger so as to give it that effect? In short, which of the two grantees own the land? Please give authorities. LEX.

RECENT PUBLICATIONS.

REPORTS OF CASES Adjudged and Determined in the Court of Chancery of the State of New York. Book III., Copiously Annotated by Robert Desty. Rochester, New York: The Lawyer's Co-Operative Publishing Company, Law Publishers. 1888.

We do not consider it necessary to say much of this volume of Reports, as the profession, and particularly equity practitioners, will readily understand its great value upon being informed that it is substantially volumes 3, 4, 5 and 6, of Paige's Chancery Reports, supplemented by very able and profuse notes appended to each case, prepared by Robert Desty, Esq., whose ability in that direction is unquestioned.

DIGEST OF INSURANCE CASES, Embracing the Decisions of the Supreme and Circuit Courts of the United States, of the Supreme and Appellate Courts of the Various States and Foreign Countries upon Disputed Points in Fire, Life, Marine, Accident and Assessment Insurance, and Affecting, Fraternal and Benefit Orders, and Containing also a Reference to Annotated Insurance Cases in Editorials in Law Journals, for the Year Ending October 31, 1888, by John A. Finch, of the Indianapolis Bar. Indianapolis: The Rough Notes Company, Publishers. 1888.

Beyond the statement of its title page, little can or need be said, by way of review, of a digest, for to determine its accuracy and scope, upon which its value chiefly depends, more than cursory examination is necessary. But it seems to us that a digest like this would be of great value, not only to lawyers whose practice is chiefly, or at all, in the line of insurance, but also to those outside the profession whose business and interest lies in that direction. As to its matter we can only say that it seems to be well and carefully prepared.

JETSAM AND FLOTSAM.

A LONDON attorney recently tendered a bill in which the last item was thus stated: "To dining with you after the case was lost."

A SUGGESTION to our legislature in the way of a new cause for divorce.—"Boss," inquired a darkey yesterday of a lawyer in the city court room, "kin I git a divorce here?"

"I don't know," replied the lawyer. "Has your wife been untrue to you?"

"Deed she has, boss."

"Well, what did she do?"

"Well, sah, me an' her married in February, an' in less'n a month I was jes bleeged to quit her."

"What was the matter?"

"She jes wouldn't s'port me, dat's w'ats de matter. I wants a divorce."

A WARD statesman, whose testimony was needed in an election fraud case, was put on the witness stand. "Raise your right hand," said the court; "do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so——" "Hold up, judge," interrupted the witness, "can't you mitigate that sentence just a little? You know I've been in politice for a good long while."

VISITOR: "What is the matter with that man?"
Superintendent: "Softening of the brain, we believe; can't tell. He appears to be as wise as any one, but his personal history shows that his memory is liable to such bad lapses that it is not safe for him to be at large. He was a city official once, but when called on to testify against other officials in some boodler cases, it was suddenly discovered that he could not remember anything at all. The court ordered him to be sent to the asylum for treatment, and he'll stay here until he recovers."

AN INCORRIGIBLE WITNESS.—It was a horse case. Horse cases are difficult to deal with, and in the course of the trial a horsey-looking witness was put in the box. Counsel asked him what happened.

Witness: "I sez, sez I: 'How about the hoss?' and he zaid he'd give me 10 shillings to zay nothing about un."

Counsel: "He did not say he would give you 10 shillings."

Witness: "Yes a did; that's exactly what a did zay."

Counsel: "He could not have said 'he;' he must have spoken in the first person."

Witness; "No, I was the first person that spoke. I zez, zez I, 'How about the hoss?'"

Counsel: "But did he not speak in the third person?"

Witness: "There was no third person present, only he and me."

The judge (interposing): "Listen to me, witness. He could not have said, 'He would give you 10 shillins to say nothing about it,' but 'I will give you 10 shillings.'"

Witness: "He zaid nothing about your lordship. If a zaid anything about your lordship I never heerd un. And if there was a third person present I never zeed un."

Point given up.

FROM QUAINT NANTUCKET.—*A propos* of Nantucket, one hears some rather odd sayings and of some quaint happenings there. "You see, we are somewhat out of the way," said one of the islanders; "so tramps seldom trouble us, and it is only when our summer visitors come that we think of locking our doors at night." Last fall a man was tried for petty larceny, and sentenced by the judge to three months in gaol. A few days after the trial, the judge, accompanied by the sheriff, was on his way to the Boston boat when they passed a man sawing wood. The sawer stopped his work, touched his hat, and said, "Good morning, judge." The judge looked at him a moment, passed on a short distance, then turned to glance backward, with the question, "Why, sheriff, isn't that the man I sentenced to three months in gaol?" "Yes," replied the sheriff, hesitatingly; "yes, that's the man; but you—you see, judge, we—we haven't anyone in gaol now, and we thought it a useless expense to hire somebody to keep the gaol for three months just for this one man; so I gave him the gaol key, and told him that if he'd sleep there nights it would be all right.

BOBBY had eaten part of the preserves on the shelf, and so his mother shut him up in the closet. On letting him out she discovered that he had eaten the rest of the preserves. Much displeased, she asked him why he had done so. Because, ma, he replied, I heard pa tell one of his clients that a person couldn't be punished twice for the same offense.